TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 353 66.

THE CANTON INSURANCE COMPANY (LIMITED) ET AL., APPELLANTS,

vs.

JOHN MacINTYRE, JR., ET AL., CLAIMANTS OF THE STEAMSHIP "VICTORY," AND THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), CLAIMANT OF THE STEAMSHIP "PLYMOUTHIAN."

No. 354 67.

JOHN MacINTYRE, JR., ET AL., CLAIMANTS OF THE STEAMSHIP "VICTORY," APPELLANTS,

vs.

THE CANTON INSURANCE COMPANY (LIMITED) ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONS FILED OCTOBER 1, 1895.

CERTIORARI AND RETURN FILED NOVEMBER 20, 1895.

(16,047 & 16,048.)

210

(16,047 & 16,048.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 353.

THE CANTON INSURANCE COMPANY (LIMITED) ET AL., APPELLANTS,

vs.

JOHN MACINTYRE, JR., ET AL., CLAIMANTS OF THE STEAMSHIP "VICTORY," AND THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), CLAIMANT OF THE STEAMSHIP "PLYMOTHIAN."

No. 354

JOHN MACINTYRE, JR., ET AL., CLAIMANTS OF THE STEAMSHIP "VICTORY," APPELLANTS,

vs.

THE CANTON INSURANCE COMPANY (LIMITED) ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Page.
Transcript from the district court of the United States for the eastern district of Virginia	1
Petition for limitation of liability of John MacIntyre, Jr., *et al*	1
Answer of Canton Insurance Co. (Limited) *et al*	4
Answer of Port of Plymouth Steamship Co. (Limited)	8

Page.

Petition for limitation of liability of Port of Plymouth Steamship Co. (Limited) 11
Answer of Canton Insurance Co. (Limited) *et al* 14
Answer of John Macintyre, Jr., *et al* 18
Evidence 20
Testimony of Robert Wigham 21
Joseph South 25
David Rankin 30
Notice to take depositions 31
Commissioner's certificate 32
Testimony of Wm. C. Candlish 32
Henry S. Gilbert 60
John J. Crowell 82
Donald Munro 85
James Pattison 88
Richard Middleton 94
Michael Scott 107
Samuel Stewart 117
Stephen Elcoate 129
Exhibit A—Diagram 161
B—Chief engineer's log book of steamship "Victory" from Tyne towards Norfolk 163
Copy of extract from chief officer's log of steamship "Victory" for November 12, 1891 165
Testimony of Geo. A. Scullard 165
C. Cronquist 173
Wm. Pearse 178
H. W. Ham 183
Albert Schroder 201
Wm. Lyons 208
Jno. Hendema 219
Chas. Baird 230
Jos. Wood 237
Gustav Ecrath 255
Allen Mardon 260
Exhibit A—Extract from copy of entry in engineer's log of steamship "Plymothian" for the 12th of November, 1891, voyage from Galveston to Liverpool 282
B—Extract from copy of chief officer's log of steamship "Plymothian" of 12th of November, 1892, voyage from Galveston to Liverpool 283
C—Diagram 285
D—Diagram 287
Testimony of William Swain 289
D. W. Pratt 305
M. C. Wood 312
L. C. W. Page 313
Jonathan Martin 318
Frederick Tweddle 324
Charles Nelson 329
Supervising inspector's rule No. 1 for pilots 344
Diagram from supervising inspector's rules 345

Page.
Testimony of John Brown 346
Robert Etheridge 352
Robert C. Henley 359
Caleb Goodwin 372
Jno. I. Clark 387
W. T. Harrison 394
Jos. M. Clark 400
James Wynne 403
E. H. Sanford 413
W. H. Quigley, Jr. 419
J. L. Pebworth 423
A. M. Channel 428
Pilot rules Nos. 2 and 3 431
Diagram of third situation 432
Testimony of S. A. Harney 433
Extract from answer of S. Elcoate, master, filed December 11, 1891, to libel of Ralli Bros. *et al.* 436
Extract from answer of Allen Mardon, master, filed December 3, 1891, to libel of S. Elcoate, master 442
Extract from answer of Allen Mardon, master, filed December 28, 1891, to libel of Ralli Bros. *et al.* 443
Opinion 447
Final decree 458
Notice of appeal by Canton Insurance Co. (Limited) *et al.* 466
Petition for appeal by Canton Insurance Co. (Limited) *et al* 467
Allowance of appeal of Canton Insurance Co. (Limited) *et al.* 473
Assignment of errors by Canton Insurance Co. (Limited) *et al.* 473
Citation on appeal of Canton Insurance Co. (Limited) *et al.* 476
Notice of appeal by John MacIntyre, Jr., *et al* 476
Petition for appeal and assignment of errors of John MacIntyre, Jr., *et al.* 477
Allowance of appeal of John MacIntyre, Jr., *et al* 479
Citation on appeal of John MacIntyre, Jr., *et al.* 479
Stipulation as to record on appeal 480
Clerk's certificate 481
Hearing and submission 483
Stipulation as to facts, etc 483
Bills of lading 485
Opinion 498
Petition of steamship "Victory" for rehearing 505
Petition of steamship "Plymothian" for rehearing 508
Order denying petitions for rehearing 512
Decree 513
Order withholding mandate 515
Clerk's certificate 516
Writ of certiorari 517
Return to writ of certiorari 518
Stipulation as to return to writ of certiorari 518
Letter of Butler, Stillman & Hubbard to Convers & Kirlin, Nov. 8, 1895. 518
Clerk's certificate 519

TRANSCRIPT OF RECORD.

DISTRICT COURT OF THE UNITED STATES,
Eastern District of Virginia.

At Norfolk, December 3rd, 1891.

Be it remembered, that on the said day came John McIntyre et al., and filed the following:

(2) PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Robert W. Hughes, District Judge of the United States for the Eastern District of Virginia.

The petition of John MacIntyre, Junior, Thomas C. MacIntyre, James Allan MacIntyre, Cuthbert Hutchinson, Peter Allan, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, Limited, in a cause of action, civil and maritime, for the limitation of liability, respectfully shows:

1. The petitioners, who are of Great Britain, are, and at the time of the collision hereinafter mentioned, were the sole owners of the British Steamship "Victory," which at the time of said collision was tight, staunch, strong and in every way well manned, officered and appointed.

2. On the afternoon of Thursday, November 12th, 1891, the said steamer hove up anchor in Hampton Roads, in order to proceed on her voyage to Norfolk, whither she was bound, being at the time light, and carrying no passengers. On arriving near Craney Island Light, she was slowed down and proceeded at slow speed on the eastern side of the main ship channel, in order to avoid certain vessels which were seen approaching, and which she passed starboard to starboard, being at the time in charge of a licensed Virginia pilot, and having her crew properly stationed. Soon after
(3) passing Craney Island Light, and while to the southward of it, a steamer was observed which had come out from Lambert's Point, and had gone over to the western side of the channel, apparently starting down the river.

While the vessels were in this relative position, two whistles were blown by the Victory to this steamer. The steamer responded, but her whistle was so faint that the pilot who was in charge of the Victory did not hear it, and it was understood differently by different parties, the master of the Victory taking it to be two whistles, and others not understanding whether it was one or two. Thereupon the Victory repeated her signal of two whistles, but the other steamer, instead of regarding it, ported her helm and swung herself across the channel and across the bows of the Victory, which meanwhile had given three short whistles and put her engines full astern and done everything in her power to avoid collision. The Victory could not have ported, since there was a small sailing vessel on her starboard bow which prevented such a manœuvre, even if the whistle of the approaching steamer was a single whistle. The approaching vessel proved to be the steamer "Plymothian," and in the collision which immediately ensued she was so badly injured that she sunk, being at the time laden with a valuable cargo, which was greatly damaged, as was also said vessel by reason of said collision.

3. The petitioners charge that the said collision was caused solely by the fault and negligence of those in charge of the said steamer Plymothian, in not obeying the signal (4) of two whistles, if the faint reply from her whistle was two signals, in giving a cross signal if the same was a single whistle, in not promptly stopping and backing, in porting and throwing herself across the bows of the Victory, and in other respects to be hereinafter shown, and that the Victory was free from blame in the premises.

4. The said steamer Victory after said collision proceeded to Norfolk, and subsequently, to-wit: on the 27 day of November, 1891, a libel was filed by the owners and underwriters of the cargo of the steamer Plymothian, who are of Texas, Pennsylvania, New York and England, against both steamers, claiming that both were in fault in said collision, and seeking to hold both liable for the damage to cargo received in consequence of said collision, and claiming that the amount of said damage is very large, to-wit: over $80,000. Said libel was filed in the District Court of the United States for the Eastern District of Virginia at Norfolk, both vessels being now in said district, and the said collision having occurred therein.

5. The petitioners aver, on information and belief, that the said steamer Plymothian is owned by the "Port of Plymouth Steamship Company, Limited," Bellamy & Co. being her managing owners, all of whom are of Great Britain; and they also aver that the said owner of the Plymothian

claims that the said collision was due to negligence on the part of the Victory, and intends to proceed against the same or her owners for damages to the Plymothian arising from
(5) said collision.

6. The petitioners aver that the said collision occurred, and the resulting damages, losses, injuries and claims were occasioned and incurred without the privity or knowledge of the petitioners, or any or either of them; that they are entitled to and desire to contest their liability for all losses, damages, injuries or claims occasioned by or arising out of said collision, and also to have the benefit of the limitation of liability provided by the general maritime law under the provisions of sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States of America, and to that end desire that the said steamer be appraised, and that they may be allowed to give a stipulation for the appraised value, and that the said steamer be released from all liability to be arrested, and that all persons having any claims be required to look to said stipulation.

Wherefore the petitioners pray for a decree of this court that they are not liable for the loss and damage and injuries and claims occasioned by and arising out of said collision or any part thereof, and that they are entitled to the benefit of the afore-mentioned provisions for limitation of their liability, and that this court will appoint proper persons to make an appraisment of the value of the said steamer Victory as she was just after said collision, and that they be allowed to enter into stipulation for such appraised value, to stand in place of the said vessel, her tackle, apparel, furniture and freight, and that they be al-
(6) lowed to contest their liability or the liability of their said steamer for said collision, and that upon giving such bond the court shall issue monition against all persons claiming damages, loss or injury occasioned by or arising out of said collision, citing them to appear before this court and make due proof of their respective claims at or before a certain time, to be named in said writ, not less than three months from the issuing of the same, and that public notice of such monition may be given as in other cases, and such other notice as the court in its discretion may direct, and that the court will also make an order to restrain the further prosecution of all and any suits against the petitioners, or against the said steamer, and will grant such other and further relief as in law and justice the petitioners may be entitled to receive.

PETITIONERS,
By SHARP & HUGHES,
Counsel.

Dec. 5, 1891.

This day personally appeared before me, H. S. Ackiss, U. S. Commissioner, S. Elcoate, who made oath that he is master of the steamer "Victory," and that he has read the foregoing petition, and that the same is true to best of his knowledge and belief.

STEPHEN ELCOATE.

Subscribed and sworn to before me this 3rd day of Dec., 1891.

Seal.

H. S. ACKISS,
U. S. Commissioner.

(7) ANSWER OF CANTON INSURANCE CO. (LIMITED), ET ALS.

Filed March 23rd, 1894,

To the Honorable Robert W. Hughes, District Judge of the United States for the Eastern District of Virginia:

The Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Insurance Company, Limited, and Atlantic Mutual Insurance Company, the London Assurance Corporation, the copartnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the President and Directors of the Insurance Company of North America answer as follows the petition of John C. McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Lietch, and the British Steamship Investment Trust, Limited, owners of the steamship "Victory:"

First. The respondents allege that they have appeared in pursuance of the monition issued in the above proceedings and have established claims before Allen R. Hanckel, a commissioner appointed to take proof of claims arising out of the collision between the steamships "Victory" and "Plymothian," referred to in the petition.

Second. The Canton Insurance Company, Limited, is a corporation organized and existing under the laws of Great Britain, and has established a claim in the amount of
(8) £1,848, equivalent to $8,993.29.

The Triton Insurance Company, Limited, is a corporation organized and existing under and pursuant to the laws

of Great Britain, and has established a claim in the amount of £924 British sterling, equivalent to $4,496.64.

The Indemnity Mutual Marine Assurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim for £3,113, 10, equivalent to $15,149.41.

The Atlantic Mutual Insurance Company is a corporation organized and existing under and pursuant to the laws of the State of New York, and has established a claim in the amount of £693, 10 British sterling, equivalent to $3,374.91.

The London Assurance Corporation is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim in the amount of £1,929 British sterling, equivalent to $9,387.48.

C. T. Bowring & Co. are a co-partnership underwriting at Lloyds, England, and have established a claim in the amount of £365 British sterling, equivalent to $1,776.27.

The Standard Marine Insurance Company, Limited, is a corporation organized and existing under the laws of Great Britain, and has established a claim in the amount of £1,803 British sterling, equivalent to $8,774.30.

The British & Foreign Marine Insurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a (9) claim in the amount of £449 British sterling, equivalent to $2,185.06.

The president and directors of the insurance company of North America is a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania, and has established a claim in the amount of £3531 British sterling, equivalent to $17,183.61.

All of the said claims are in respect to losses upon the cargo of the steamship "Plymothian," and arose through the aforesaid collision with the steamer "Victory." The amounts above stated are the principal amounts only, and are subject to interest thereon from the first day of December, 1891, on or about which date the said cargo was delivered, or should have been delivered at Liverpool, England, the port of destination.

Third. The respondents admit that at the time of the said collision between the steamships "Plymothian" and "Victory," the petitioners were the owners of the British steamship "Victory."

Fourth. The respondents further admit that in the afternoon of Thursday, November 12th, 1891, the said steamship "Victory" hove up anchor in Hampton Roads to proceed on her voyage to Norfolk, where she was bound, and that

when she had reached the vicinity of Craney Island Light she saw the steamship "Plymothian" come out from Lambert's Point down the river. The respondents admit that whistles were exchanged between the said steamship "Ply-
(10) mothian" and the said steamship "Victory" to indicate the courses that they would respectively take, but deny that the signal given by the "Plymothian" was a signal of two blasts or that it was so understood by the master of the "Victory," and aver that it was a signal of one blast and that it was understood to be such by the master of the "Victory." The respondents admit that the "Victory," instead of assenting to said signal of one blast gave a signal of two blasts, and proceeded to the eastern side of the channel and persisted in taking a course on the eastern side of the channel until the two steamers had reached a position in which collision was inevitable; and they deny that the "Victory" stopped or reversed her engines in time to be of any avail before the collision occurred; and they aver that the collision was a violent one and that the "Victory" cut deep into the side of the "Plymothian" and caused her to fill with water and to sink.

The respondents aver that as a result of the sinking of the "Plymothian" her cargo was greatly damaged, and serious expenses were incurred in recovering it, reconditioning it as far as it could practicably be reconditioned and forwarding it; and that the losses above stated are the losses incurred by the respondents as underwriters upon said cargo by reason of the collision and the consequent damage.

Fifth. The respondents, upon information and belief, deny that the "Victory" was free from blame in the matter of the collision.

(11.) Sixth. The respondents, upon information and belief, admit the allegations in the fourth and fifth articles in said petition contained.

Seventh. The respondents deny any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of said petition.

Eighth. The respondents aver that the said collision was due to the fault and negligence of those on board of and navigating the "Plymothian," in that they did not keep a good and sufficient lookout; in that they did not give earlier signals to the "Victory"; that they proposed that the "Plymothian" should go down the eastern side of the channel, and in that they did not, when the "Victory" failed to reply to their signal, or, at any rate, when the "Victory" gave the signal of two blasts, indicating that she was pro-

posing to go up the eastern side of the channel, instantly stop and reverse; and that it was due to the fault and negligence of those on board of and in charge of navigating the "Victory," in that they did not keep a good and sufficient lookout, in that they were proceeding at too high a rate of speed; in that they did not take a course up the western side of the channel, and in that upon receiving a signal from the "Plymothian" that she was proposing to go down the eastern side of the channel they did not at once assent thereto and take the western side of the channel, or, if that was impracticable, did not instantly stop and reverse their engines instead of persisting and proceeding up the eastern side of the channel.

(12.) Wherefore the respondents pray that the appraised value of the said steamship "Plymothian" and her pending freight be distributed among them in proportion to their respective claims, and that the claim of the owners of the "Victory" be dismissed.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondents.

City and County of New York } *ss.*

Wilhelmus Mynderse, being first duly sworn, deposes and says, that he is a member of the firm of Butler, Stillman & Hubbard, proctors for the respondents above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further states that the sources of his information and the grounds of his belief as to all matters not stated of his own knowledge are derived from statements made to him by representatives of the respondents, investigation of the circumstances attendant upon the matters stated in the foregoing answer and possession of documents relating to the same, and depositions of witnesses taken in reference to the said matters.

WILHELMUS MYNDERSE.

Sworn to before me this 22d day of March, 1894.

{ Seal }

WM. F. JUDSON,
Notary Public,
Westchester County,
Certificate filed in N. Y. Co.

(13) ANSWER OF PORT OF PLYMOUTH STEAMSHIP CO. (LIMITED.)

Filed April 14th, 1892.

To the Honorable Robert W. Hughes, Judge of the Court aforesaid:

The petition of the Port of Plymouth Steamship Company (Limited), of Plymouth, Devonshire, England (Bellamy & Company, managing owners), a corporation duly organized and existing under the laws of Great Britain, alleges as follows:

1st. The petitioner, a corporation duly organized and existing under the laws of Great Britain, as aforesaid, is, and at the time of the collision hereinafter mentioned, was, the sole owner of the British steamship "Plymothian," which said steamship at the time of said collision was tight, staunch, strong, well manned, officered and appointed.

2nd. That on the evening of Thursday, November 12th, 1891, said steamship "Plymothian" was lying on the north side of the coal pier at Lambert's Point, in the Elizabeth river, in the district aforesaid, having left the port of Galveston, Texas, with a large and valuable cargo, consisting (14) of 3,682 bales of cotton, on or about the 1st day of November, 1891, bound on a voyage to the port of Liverpool, England, and had put in to Lambert's Point aforesaid for coal.

That, having completed her coaling, she proceeded, with her master and an experienced and licensed Virginia pilot on her bridge, and with her other officers and crew properly stationed, from said pier down the Elizabeth river in the further prosecution of her said voyage.

That she in due course passed buoy number 9 in said river, under a port helm, leaving said buoy to the east, close aboard. That her course was then diverted slowly down along the eastern side of the ship channel, her proper course. That the tide was strong flood. That almost immediately upon clearing said buoy No. 9 a steamer was observed in the Elizabeth river, coming up, almost abreast of Craney Island Lighthouse, at a rapid speed, which afterwards proved to be the steamship "Victory." That immediately one blast of the Plymothian's steam-whistle was sounded, loud, clear and distinct, to the said steamer; that no response was given to said signal, which was twice repeated at short intervals of time, when finally an answer was sounded by the Victory, being the cross signal of two whistles.

In the meantime the Plymothian had been proceeding

slowly down the eastern side of the said channel, and the Victory up the middle of said channel rapidly, until the latter sounded her two whistles, when her helm was seemingly put hard a starboard, and she headed directly across (15) the track of the Plymothian. Immediately upon these two whistles being heard from the Victory the engines of the Plymothian were stopped and reversed full speed, and danger signals sounded, the helm put hard aport, and everything done that was possible to avert the collision now inevitable. The Victory also sounded danger signals and reversed her engines, but not in sufficient time, as she continued to approach under her said starboard helm, and came into the Plymothian with much force, striking her just abaft the bride, and doing great damage. That at the time of said collision the headway of the said Plymothian had been entirely checked.

Said collision occurred immediately to the south of buoy No. 7, at a short distance therefrom, in the eastern edge of the main ship channel.

3rd. Your petitioner avers and charges that said collision was caused solely by the fault and negligence of those in charge of and navigating the said steamship Victory, in not keeping in a proper course; in not answering the single blast of the whistle from the Plymothian and shaping her course accordingly; in giving a cross signal to the signals of one whistle given by the Plymothian; in proceeding at an undue rate of speed; in not promptly stopping and backing; in starboarding her helm and heading across the course of the Plymothian, thereby causing the collision which ensued; and in other respects to be hereafter shown. And that the said collision was caused in no manner and to no extent by the fault, negligence, or want of (16) skill upon the part of those in charge of the navigation of the steamship Plymothian, who did their full duty in the premises, and in every way did all in their power to avert the collision.

4th. That in the collision aforesaid great damage was done the said steamship Plymothian, the Victory striking her just abaft the bridge on the port side, cutting her down about twenty-two feet, and causing her to make water very rapidly. That her master, immediately after said collision, perceiving that his vessel was about to sink, rang up his engines and proceeded with all speed to beach the Plymothian on the flats on the eastern side of said Elizabeth river, where, with her valuable cargo, she soon settled on the bottom, though in shallow water.

That promptly thereafter, the services of salvors were engaged, who proceeded to discharge her said cargo and to

raise said steamship. That said salvage services were completed on the day of November, when she proceeded to the port of Newport News to undergo repairs. That certain repairs were there placed on her, and that afterwards she proceeded to England, where other and necessary repairs, occasioned by said collision, have also been placed on her.

That as a direct result of said collision, large and heavy salvage expenses and repair bills have been rendered necessary; that very great loss of time and use of the vessel have been suffered by your petitioner, heavy expenses in-
(17) curred and heavy damage in the loss of freight occasioned to said petitioner, the exact amounts and items of which cannot at this time be given with sufficient accuracy; but your petitioner avers and believes that the entire loss and injury occasioned to it by said collision, will aggregate at the least the large sum of sixty-five thousand ($65,000) dollars, all of which your petitioner is entitled to recover of and from the said steamship Victory or her owners. Due proof of said damages will be offered by your petitioner at the proper time and place.

5th. That the owners of said steamship Victory in this proceeding have petitioned for a limitation of liability under the acts of Congress in such case made and provided, have had appraisement of said steamship Victory had, under the order of this Honorable Court in these proceedings, and have given bond for said appraised value; have enjoined all persons from asserting any claims against said steamship or her owners for damages, loss or injury occasioned by or arising out of said collision from instituting suit to prosecute such claims, save in these proceedings, and have issued a monition against all such persons to appear before this court and make due proof of their claims before the 15th day of April, 1892.

That pursuant to said monition your petitioner now files this his petition, setting forth his claim for damages, loss and injury occasioned by said collision as aforesaid, and prays that this court will decree that said steamship Vic-
(18) tory was solely in fault in the collision aforesaid, will order her appraised value to be paid into court and direct that your petitioner may, out of the same, be paid his said claim in full, or such proportion thereof as he may be entitled to receive, and will grant such other further and general relief to your petitioner as it may be entitled to ask and receive.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
By WHITEHURST & HUGHES, Proctors.

WHITEHURST & HUGHES, Proctors for Petitioner.

Sworn to before me this 14th day of April, 1892, by Floyd Hughes on information and belief.

Seal

H. S. ACKISS,
Clerk.

(19) And also, to-wit: on December 3d, 1891, the Port of Plymouth Steamship Company, Limited, filed the following:

PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Robert W. Hughes, Judge of the United States District Court for the Eastern District of Virginia:

The petition of the Port of Plymouth Steamship Company, Limited, of Plymouth, Devonshire, England, (Bellamy & Company, managing owners,) a corporation duly organized and existing under the laws of Great Britain, in a cause of action civil and maritime for the limitation of liability, respectfully shows:

First. The petitioner, a corporation duly organized and existing under the laws of Great Britain, as aforesaid, is, and at the time of the collision hereinafter mentioned was, the sole owner of the British steamship Plymothian, which, at the time of said collision, was tight, staunch, strong well manned, officered and appointed.

Second. That on the afternoon of Thursday, November 12th, 1891, said steamship Plymothian was lying on the north side of the coal pier at Lambert's Point in the Elizabeth river, Virginia, having left the port of Galveston, Texas, with a large and valuable cargo, consisting of 3,682 bales of cotton, on or about the 1st day of November, 1891, bound on a voyage to the port of Liverpool, England, and had put in to Lambert's Point, aforesaid, for coal; that, having (20) completed her coaling, she proceeded, with her master and an experienced and licensed Virginia pilot on her bridge, and with her other officers and crew properly stationed, from said pier down the Elizabeth river in the further prosecution of her said voyage; that she in due course passed buoy number 9 in said river under a port helm, leaving said buoy to the east, close aboard; that her course was then continued down slowly along the eastern side of the ship channel, her proper course; that the tide was strong flood; that almost immediately upon clearing said buoy number 9 a steamer was observed in the Elizabeth river coming up and almost abreast of Craney Island Lighthouse, at a rapid speed, which afterwards proved to be the steamship Victory; that immediately one blast of the Plymothian's steam-whistle was sounded loud, clear, and distinct to the said steamer; that no response was given to

said signal, which was twice repeated at short intervals of time, when finally an answer was sounded by the Victory, and then the cross-signal of two whistles were heard. In the meantime the Plymothian had been proceeding slowly down the eastern side of the said channel, and the Victory up the middle of the said channel rapidly, until the latter sounded her two whistles, when her helm was seemingly put hard-a-starboard and she headed directly across the track of the Plymothian. Immediately upon these two whistles (20½) being heard from the Victory, the engines of the Plymothian were stopped and reversed at full speed, and danger signals were sounded, the helm put hard a-port, and everything done that was possible to avert the collision, now inevitable. The Victory also sounded danger signals and reversed her engines, but not in sufficient time, as she continued to approach her under her said starboard helm, and came into the Plymothian with much force, striking her just abaft the bridge and doing her great damage.

At the time of the said collision the headway of the said Plymothian had been entirely checked.

Said collision occurred immediately to the south of buoy number 7, and at a short distance therefrom, in the eastern edge of the main ship channel.

Third. Your petitioner avers and charges that this collision was caused solely by the fault and negligence of those in charge of the said steamship Victory, in not keeping in their proper course; in not answering the single blast of the whistle from the Plymothian and shaping her course accordingly; in giving a cross signal to the said single blast; in not promptly stopping and backing; in starboarding her helm and heading across the course of the Plymothian, thereby causing the collision which immediately ensued; and in other respects to be hereafter shown. And that the said collision was caused in no manner and to to no extent by the fault, negligence or want of skill upon the part of those in charge of the steamship Plymothian.

(21) That great damage was suffered by said steamship in said collision.

That the master immediately after the said collision, perceiving that his vessel was about to sink, rang up his engines and proceeded as rapidly as possible to beach his vessel on the flats on the eastern side of the Elizabeth river, where, with her large and valuable cargo, she soon settled on the bottom, though in shallow water. That promptly thereafter salvors proceeded to take out said cargo and to raise said ship; that the said salvage service was completed on the day of November, 1891, and said vessel pro-

ceeded to the port of Newport News, where she has since been undergoing temporary repairs.

Fourth. That on the 14th day of November, 1891, a libel was filed in this Honorable Court by S. Elcoate, master of said steamship Victory, on behalf of her owners, against said steamship Plymothian, alleging that she was in fault in the collision aforesaid, and claiming that the Victory had suffered damages therein to the extent of $10,000, and praying this Honorable Court to hold said steamship Plymothian liable therefor.

Fifth. That subsequently, to-wit: on the 27th day of November, 1891, a libel was filed by the owners and underwriters of the cargo of said steamship Plymothian, who are in Texas, Pennsylvania, New York and England, against both the said steamers Victory and Plymothian, claiming that both were in fault for said collision, and seeking to hold both liable for the damage to cargo arising in conse-
(22) quence of said collision, claiming that the amount of said damage was very large, to-wit: over $80,000. Said libel was also filed in this the Honorable District Court for the Eastern District of Virginia, at Norfolk, both vessels being now in said district, and said collision having occurred therein.

Sixth. Your petitioner avers on information and belief that the steamer Victory is owned by John MacIntyre, Junior, and others, all of whom are residents of the kingdom of Great Britain.

Seventh. Your petitioner avers that the said collision occurred and the resulting losses, damages, injuries and claims were occasioned and incurred without the privity or knowledge of said petitioner, or any of them or said managing owners. That said petitioner is entitled to and desires to contest the liability for losses, damages, injuries or claims occasioned by, or arising out of said collision, and also to have the general maritime law under the provisions of sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States of America, and Acts amendatory thereto, and to that end that the steamer may be appraised, and the said petitioner allowed to give a stipulation for her value as fixed by her appraisers, or pay into court such appraised value; and that the said steamer be released from all liability to be arrested, and that all persons having any claims be required to look to said stipulation or fund;

Wherefore, this petitioner prays for a decree of this court that said petitioner is not liable for the losses and damages
(23) and injuries and claims occasioned by, and arising out of said collision, or any part thereof, and that the said petitioner is entitled to the said provisions of the aforesaid

limitation of liability, and that this court will appoint proper appraisers to make an appraisement of the value of said steamer Plymothian, as she was just after the collision, in said sinking condition; and that the said petitioner be allowed to enter into stipulation for such appraised value, or pay said appraised value into court to stand in place of said vessel, her tackle, apparel and furniture and freight; and that said petitioner be allowed to contest its liability, or the liability of said steamer for the said collision, and then, that upon giving such bond into court, this court shall issue monition against all persons claiming damages, losses or injuries occasioned by or arising out of said collision, citing them to appear before this court and to make due proof of their respective claims at or before this court, and to make due proof of their respective claims at or before a certain time, to be named in said writ, not less than three months from the issuance of same, and that due notice of said monition shall be given as in other cases, and such other notice as the court in its discretion may decree. And that the court will also make an order to restrain the further prosecution of any or all suits against this petitioner or against the said steamer, and grant her such other and furter relief as in law and justice said petitioner may be entitled to receive.

PETITIONER.
By WHITEHURST & HUGHES,
Proctors.

Dec. 3, 1891.

(Duly sworn to.)

ANSWER OF CANTON INSURANCE CO., LIMITED, ET ALS.

(24) Filed March 23rd, 1894.

To the Honorable Robert W. Hughes, District Judge of the United States for the Eastern District of Virginia.

The Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, answer as follows the petition of the Port of Plymouth Steamship Company, Limited, in a cause of action, civil and maritime, for the limitation of their liability.

First. The respondents allege that they have appeared in pursuance of the monition issued in the above proceeding

and have established claims before Allen R. Hankel, a commissioner appointed to take proof of claims arising out of the collision between the steamships "Victory" and "Plymothian," referred to in the petition.

Second. The Canton Insurance Company, Limited, is a corporation organized and existing under the laws of Great Britain, and has established a claim in the amount of (24½) £1,848, equivalent to $8,993.29,

The Triton Insurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim in the amount of £924 British sterling, equivalent to $4,496.64.

The Indemnity Mutual Marine Assurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim for £3,113, 10, equivalent to $15,149.41.

The Atlantic Mutual Insurance Company is a corporation organized and existing under and pursuant to the laws of the State of New York, and has established a claim in the amount of £693, 10 British sterling, equivalent to $3,374.91.

The London Assurance Corporation is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim in the amount of £1,929 British sterling, equivalent to $9,387.48.

C. T. Bowring & Co., are a co-partnership underwriting at Lloyds, England, and have established a claim in the amount of £365 British sterling, equivalent to $1,776.27.

The Standard Marine Insurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim in the amount of £1,803 British sterling, equivalent to $8,774.30.

The British & Foreign Marine Insurance Company, Limited, is a corporation organized and existing under and pursuant to the laws of Great Britain, and has established a claim in the amount of £449 British sterling, equivalent to $2,185.06.

(25) The president and directors of the insurance company of North America is a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania, and has established a claim in the amount of £3531 British sterling, equivalent to $17,183,61.

All of the said claims are in respect to losses upon the cargo of the steamship "Plymothiam," and arose through the aforesaid collision with the steamer "Victory." The amounts above stated are the principal amounts only, and are subject to interest thereon from the first day of Decem-

ber, 1891, on or about which date the said cargo was delivered, or should have been delivered at Liverpool, England, the port of destination.

Third. The respondents admit that at the time of the said collision between the steamships "Plymothian" and "Victory," the petitioner was the owner of the British steamship "Plymothian."

Fourth. The respondents upon information and belief admit that in the afternoon of Thursday, November 12th, 1891, the said steamship "Plymothian" was lying on the north side of the coal pier at Lambert's Point, in Elizabeth river, Virginia, having left the port of Galveston, Texas, with a large and valuable cargo, consisting of 3,882 bales of cotton, bound on a voyage to the port of Liverpool, England, and that she put into Lambert's Point aforesaid for coals. The respondents admit that (26) that the said steamship having completed her coaling proceeded with her master and pilot in charge from said pier down the Elizabeth river in the further prosecution of her voyage, and that in due course she passed buoy No. 9 in said river under a port helm, leaving said buoy to the east, and that her course was then continued down the ship channel and that the tide was a strong flood. The respondents admit that those on board of and navigating the "Plymothian" discovered the "Victory" coming up the river at a high rate of speed and about abreast of Craney Island Light, and that a signal of one blast of the "Plymothian's" whistle was sounded to the said steamship "Victory," indicating that the "Plymothian" would proceed down the river on the eastern side, and that the "Victory" should proceed up the river on the western side; that the "Victory" at first paid no attention to the signals of the "Plymothian," and thereafter replied with a signal of two blasts, indicating that she would proceed up the river on the eastern side and that the "Plymothian" should proceed down the river on the western side. Notwithstanding this disagreement between the navigators of the two vessels as to the courses the vessels should take respectively, each persisted in the course indicated by its own navigators and continued thereon without change of speed until a collision became inevitable. Then the steamships came into collision, the stem of the "Victory" striking the port side of the "Plymothian," cutting far into her and causing her to take in water, because of which she sank.

(27) As a result of the sinking of the "Plymothian" her cargo was greatly damaged, and serious expenses were incurred in recovering it, reconditioning it as far as it could practicably be reconditioned and forwarding it; and

that the losses above stated are the losses incurred by the respondents as underwriters upon said cargo by reason of the collision and the consequent damage.

Fifth. The respondents, upon information and belief, admit the allegations in the fourth, fifth, and sixth articles in said petition contained.

Sixth. The respondents have no knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of said petition.

Seventh. The respondents aver that the said collision was due to the fault and negligence of those on board of and navigating the "Plymothian," in that they did not keep a good and sufficient lookout; in that they did not give earlier signals to the "Victory" that they proposed that the "Plymothian" should go down the eastern side of the channel, and in that they did not, when the "Victory" failed to reply to their signal, or, at any rate, when the "Victory" gave the signal of two blasts, indicating that she was proposing to go up the eastern side of the channel, instantly stop and reverse; and that it was due to the fault and negligence of those on board of and in charge of navigating the "Victory," in that they did not keep a good and sufficient lookout, in that they were proceeding at too high a (28) rate of speed; in that they did not take a course up the western side of the channel, and in that upon receiving a signal from the "Plymothian" that she was proposing to go down the eastern side of the channel they did not at once assent thereto and take the western side of the channel, or, if that was impracticable, did not instantly stop and reverse their engines instead of persisting and proceeding up the eastern side of the channel.

Wherefore the respondents pray that the appraised value of the said steamship "Plymothian" and her pending freight be distributed among them in proportion to their respective claims, and that the claim of the owners of the steamship "Victory" be dismissed.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondents.

City and County of New York } *ss.*

Wilhelmus Mynderse, being first duly sworn, deposes and says, that he is a member of the firm of Butler, Stillman & Hubbard, proctors for the respondents above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged on informa-

tion and belief, and that as to those matters he believes it to be true.

Deponent further states that the sources of his informa-
(29) tion and the grounds of his belief as to all matters not stated of his own knowledge are derived from statements made to him by representatives of the respondents, investigation of the circumstances attendant upon the matters stated in the foregoing answer and possession of documents relating to the same, and depositions of witnesses taken in reference to the said matters.

WILHELMUS MYNDERSE.

Sworn to before me this 22nd day of March, 1894.

{ Seal }

WM. F. JUDSON,
Notary Public,
Westchester County,
Certificate filed in N. Y. Co.

(30) **ANSWER OF JOHN MACINTYRE, Jr., ET AL**

Filed April 12th, 1894.

The answer of John MacIntyre, junior, Thomas C. MacIntyre, Jame Allan MacIntyre, Cuthbert Hutchinson, Peter Allan, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Leitch and the British Steamship Investment Trust, Limited, in a cause of action civil and maritime, to the said petition answers as follows:

1. The respondents allege that they have appeared in pursuance of the monition issued in the above proceeding and have established claims before Allen R. Hanckel, a commissioner appointed to take proof of claims arising out of the collision between the steamships "Victory" and "Plymothian," referred to in the petition.

2. The respondents in said proceeding established a claim for £2951-12-4 sterling, which, reduced to our currency, amounts to $14,363.80, which claim is in respect to losses arising from the collision between the steamers "Victory"
(31) and "Plymothian" in the petition mentioned. The above amount is the principal amount only, and is subject to interest thereon from the first day of December, 1891.

3. The respondents admit that at the time of said collision the petitioner was the owner of the British steamship "Plymothian."

4. The respondents deny the statements as to the facts of the collision and the manner in which it happened, which

are embodied in the second paragraph of the said petition, except insofar as they accord with the statement herein made as to the manner in which said collision happened.

The respondents aver that the true facts of the collision are as follows:

"On the afternoon of Thursday, November 12th, 1891, the said steamer "Victory" hove up anchor in Hampton Roads, in order to proceed on her voyage to Norfolk, whither she was bound, being at the time light, and carrying no passengers. On arriving near Craney Island Light, she was slowed down and proceeded at slow speed on the eastern side of the main ship channel, in order to avoid certain vessels which were seen approaching, and which she passed starboard to starboard, being at the time in charge of a licensed Virginia pilot, and having her crew properly stationed. Soon after passing Craney Island Light, and while to the southward of it, a steamer was observed which had come out from Lambert's Point, and had gone over to the western side (32) of the channel, apparently starting down the river. While the vessels were in this relative position, two whistles were blown by the "Victory" to this steamer. The steamer responded, but her whistle was so faint that the pilot who was in charge of the "Victory" did not hear it, and it was understood differently by different parties, the master of the "Victory" taking it to be two whistles, and others not understanding whether it was one or two. Thereupon the "Victory" repeated her signal of two whistles, but the other steamer, instead of regarding it, ported her helm and swung herself across the channel and across the bows of the "Victory," which meanwhile had given three short whistles and put her engines full speed astern and done everything in her power to avoid collision. The "Victory" could not have ported, since there was a small sailing vessel on her starboard bow which prevented such a manœuvre, even if the whistle of the approaching vessel was a single whistle. The approaching vessel proved to be the steamer "Plymothian," and in the collision which immediately ensued she was so badly injured that she sunk, being at the time laden with a valuable cargo, which was greatly damaged, as was also said vessel, by reason of said collision.

The respondents charge that the said collision was caused solely by the fault and negligence of those in charge of the said steamer "Plymothian," in not keeping out of the way of the steamer "Victory," and not obeying the signal of two whistles, if the faint reply from her whistle was two sig- (33) nals; in giving a cross-signal if the same was a single whistle; in not promptly stopping and backing; in porting and throwing herself across the bows of the "Victory," and

in other respects to be hereinafter shown, and that the "Victory" was free from blame in the premises.

5. The respondents deny the allegations and charges of the third paragraph of said petition in so far as they charge any fault upon the steamer "Victory."

6. The respondents admit upon information and belief the allegations in the fourth, fifth, and sixth articles of said petition.

7. Respondents not having any information as to the allegations of the seventh article of the petition, neither admit nor deny the same.

Wherefore the respondents pray that the appraised value of the said steamship "Plymothian" and her pending freight be distributed among the claims proved against her in proper proportion.

RESPONDENTS,
By SHARP & HUGHES,
Proctors.

(34) Robert M. Hughes, being duly sworn, says that he is a member of the firm of Sharp & Hughes; that the said firm are proctors for the respondents in the above answer; that said respondents are residents of Great Britain, and that the facts alleged in said answer are true to the best of his knowledge and belief.

ROBERT M. HUGHES.

Subscribed and sworn to before me this 12th day of April, 1894.

SD. H. H. LITTLE,
Notary Public.

(35) And at the trial of the issues joined, the following depositions were filed and evidence adduced:

EVIDENCE.

The depositions of Joseph South, David Rankin and Robert Wigham, taken in pursuance of the notice hereto attached on the 14th day of November, 1891, at 3 P. M., on the Br. Str. "Princess," then lying in the Elizabeth river, off Lambert's Point, Va., to be read as evidence on behalf of the libellant in a certain suit in admiralty now pending in the District Court of the United States for the Eastern District of Virginia at Norfolk, wherein Elcoate, master, etc., is libellant, and the Br. Str. "Plymothian" is respondent.

Present of Counsel: CHARLES SHARP, Esq., for libellant.

Special appearance by Floyd Hughes, Esq., of counsel

for respondent, who objects to the taking and filing of said depositions on the ground of want of reasonable notice to respondent, the libel in this cause having only been filed at or after 1 P. M. of this date, notice of the taking of these depositions having been presented to the master of the Plymothian at only 1:25 P. M., and left with Wm. Lamb & Co. as agents at 1:30 P. M; that counsel was employed at only 1:45 P. M., and said counsel have been unable hitherto to confer with said master, pilot or other chief officer of said Plymothian or other person cognizant of the facts of the case. Their only knowledge being gathered from a hasty glance at the libel filed in the cause, half an hour's time also being necessary to reach the appointment from the place at which notice was served. And for the (36) further reason that the copy of the notice to take these depositions which is here produced and asked to be filed herewith by the notary is entirely informal and insufficient in law.

ROBERT WIGHAM, being duly sworn, deposes as follows:

Name, Robert Wigham, 30 years of age, 2nd mate of Br. Str. Princess, now in Norfolk harbor; have been seaman 16 years; home Sutherland, England.

Princess bound for Copenhagen, Denmark; will sail tomorrow, I expect. I will go upon her when she sails.

Q. On Thursday, November 12th, 1891, shortly before 4 P. M., did you witness a collision between Craney Island and Lambert's Point, between the Br. Str. Victory and Br. Str. Plymothian, and where were you at the time? A. Yes, sir; I was standing on the bridge of the Princess.

Q. Did you see the Victory coming up the harbor near Craney Island, and from there up to scene of collision? A. Yes, sir.

Q. On which side of river was she? A. On the port side coming up.

Q. Did you hear whistles from her? A. Yes, sir; two blasts from her at one time, and they were repeated.

Q. Was that shortly before the collision? A. Yes, sir.

Q. On what side of the channel was the Plymothian at that time? A. On the starboard side of the Victory.

Q. Which of them was nearer to you? A. Plymothian.

Q. How far off was the Plymothian from the Princess at (37) that time? A. About a cable's length, 120 fathoms, when I heard the whistles from the Victory.

Q. Where was the Princess then anchored? A. below Lambert's Point, in Norfolk harbor.

Q. When the Victory sounded two whistles did you also

hear whistles in reply from Plymothian? A. I heard a sort of a whistle; very faint, though.

Q. After the collision did you hear any more whistles from the Plymothian, and that you say was very faint, how do you account for its being so faint? A. I heard no more whistles from Plymothian. They were faint for the reason that it might have been in bad order or they might not have had any steam in it.

Q. Was it a loud, clear or distinct whistle? (Question objected to as leading.) A. It was very faint.

Q. Did you regard it as a sufficient whistle? A. No, sir.

Q. Could you tell with any certainty whether it was one blast or two or more? A. All I made of it was one blast.

Q. After that what did the Victory do? A. Backed astern clear of the other ship.

Q. What did the Plymotian do after you heard the whistle from her? A. She kept going on across the bows of the other ship.

Q. But you have said that the Victory was on eastern side of the channel and Plymothian on western side, how did the Plymothian get across bows of Victory? A. Either by porting her helm or her steering gear breaking down. I don't know which.

(38) Q. Did you see the Plymothian make the movement; and if so, describe it? A. He was going down and kept altering his course to starboard all the time.

Q. Did the Victory alter her course? A. No, sir.

Q. She kept on the eastern side of the river, and the collision occurred over there? A. Yes, sir.

Q. Could that have happened without the Plymothian crossing over from the western to the eastern side of the channel? A. No, sir.

Q. Did you see any sailing vessel going down channel between these two vessels? A. Yes, sir—small schooner.

Q. You have said that the Victory backed; did you see her actually backing before collision? A. No, sir; the engines were backing, but ship was not; the engines had been going back a good bit of time, but could not say that ship was going back; think she was moving forward.

Q. While the Plymothian was moving from west side of channel across bows of Victory, what more could the Victory have done to prevent collision? A. Nothing.

Q. How about porting her helm? A. She could not have ported her helm without running down the schooner.

Q. Was that schooner in or near the middle of channel? A. A little over to eastern side.

Q. Was there much room between that schooner and western side of channel? A. Yes, sir; plenty of room.

(39) Q. Did you, shortly before collision, see any river steamer pass down between that schooner and western shore? A. Yes, sir.

Q. Was there anything to prevent the Plymothian while on western side of channel from following safely in wake of those steamers? A. No, sir.

Q. If Plymothian had kept on W. side of channel and moved down between that schooner and western shore, would she have collided with that schooner or Victory? A. No.

Q. Now tell about the whistles of Victory in the matter of their being loud, distinct, and clear? A. Yes, sir; they were loud and clear.

Q. Did it appear to you at that time or now that the Victory left undone anything she should have done to avert collision? A. No, sir.

Q. Did it appear to you at the time, or does it now, that the Victory did anything that helped to bring on collision with the Plymothian? A. No, sir; she did not.

CROSS-EXAMINATION.

By Mr. HUGHES, who, without waiving objections heretofore noted, but expressly insisting thereon, proceeds to cross-examine witness.

Q. How far was the Victory from you when you first observed her? A. About four or five cable's lengths.

Q. How far was Plymothian from you when you first observed her, and what was her course? A. About a cable's length, and her course was down the river.

(40) Q. You saw her come out from Lambert's Point, did you not? A. Yes, sir.

Q. What were the first whistles you heard sounded by either steamer? A. Victory sounded two blasts and then repeated.

Q. Those were the first whistles you heard? A. Yes, sir.

Q. Did you hear any other whistles from the Victory? A. No, sir,

Q. You were observing her closely the whole time were you not up to the time of collision? A. Yes, sir.

Q. She was coming up the river approaching you was she not, your steamer lying on her starboard bow? A. Yes, sir.

Q. How far was scene of collision from your vessel and in what direction? A. About four or five cable lengths from the ship. I couldn't tell you what direction she was lying in on the E. side of river.

Q, How far from Lambert's Point piers are you now ly-

ing, and in what direction? A. About 200 yards and across the channel.

Q. How often have you been to port of Norfolk? A. First time.

Q. You do not know the width of the channel of this river or its course? A. No, sir.

Q. How long before collision had river str. you mentioned passed down? A A few minutes.

Q, Do you know whether or not she was a vessel of light draft and bound to Newport News or up Nansemond river, (41) or do you know anything of her? A. No, sir.

Q. So you have no knowledge whether a large ocean steamer such as the Plymothian could follow such a vessel or not, ignorant as you are of this river? A. No, sir.

Q. Who was on the bridge of this vessel when all this was observed by you? A. The *mater* and 2nd engineer.

Q. Was any remark made by South then or after in your hearing as to who was at fault in this collision? A. No, sir.

Q. It was not a subject of remark then at the time? A. No, sir. The only remark that was passed was about the steering gear.

Q. How far was the Plymothian from you when she sounded her one blast? A. About a cable's length.

Q. And you heard that? A. Yes, sir.

Q. Did you hear any other? A. No, sir.

Q. How often have the facts of this collision been the subject of discussion by you and with whom? A. I never spoke about it, only when it occurred.

Q. That is the first time you have mentioned it up to the present time? A. Yes, sir.

RE-DIRECT.

Q. Did you see the master and myself this morning before this time? A. No, sir.

Q. Do you know me? A. I know that I saw you this morning in this place.

Q. Who else were present at that time? A. The captain (42) of the Victory and yourself.

Q. Who asked you then to tell of the collision? A. You did.

Q. Did I ask you of you were on deck? A. Yes, sir.

Q. And after that did you tell me the facts of the case as you have just stated them here? (Question objected to on ground that it is not competent for counsel to contradict statement of his own witness.)

Q. Before I came aboard this morning to ask you what you knew of the collision had you talked with any person

about it except the chief officer and 2nd engineer on the bridge when all of you were observing the collision? A. No, sir.

Q. You have stated that the scr. was to the east of the middle line of the channel and towards the Victory, also that there was abundant room between that schr. and the W. line of the channel for the Plymothian to pass down safely. Did you see the buoy lines on the west side of the channel at that time? A. Yes, sir.

Q. In that way did you come to know that there was abundant room? A. Yes, sir.

Q. At the time you and 2nd engineer and the chief officer of Princess were observing collision you have stated that there was a talk between the three persons about the steering gear of the Plymothian. Now state what was then said by you three persons about that? (Question objected to.) A. Either had his helm aport or his steering gear had broken down.

(43) Q After that time you state that you had no discussion with any person but that you were asked to-day by me to tell what happened and you did it? A. Yes, sir.

RE-CROSS.

Q. Have you ever discussed this case with Captain Murray of the Str. Abergeldie, and do you know such a man? A. No, sir.

And further this deponent saith not.

ROBERT WIGHAM,
2nd Officer.

Mr. JOSEPH SOUTH, being duly sworn, deposes and says:

Name South; 1st officer Princess; age 36; Sunderland, Eng., is his home. Been at sea 18 years.

Q. When will Princess go to sea and where will she go to? A. We sail to-morrow morning for Copenhagen, Denmark.

Q. Will Robert Wigham, 2nd officer, and David Rankin go to sea in her to-morrow? A. Yes, sir.

Q. Will you go to-morrow? A. Yes, sir.

Q. On the 12th of Nov., 1891, did you witness a collision, between Lambert's Point and Craney Island, between the Plymothian and Victory? A. Yes, sir.

Q. Where were you at the time? A. I was on the bridge deck when the collision occurred.

Q. Who were with you at the time? A. 2nd officer and 2nd engineer.

(44) Q. Did all three of you remain there while the Vic-

tory was passing from Craney Island to scene of the collision? A. Yes, sir.

Q. Did you or they make any remark at the time about the cause of the movement of the Plymothian towards scene of the collision? (Question objected to.) A. Yes, sir; I passed a remark that the pilot was either mad or his steering gear had got foul.

Q. Mad about what, or what made you think his steering gear out of order? (Obj.) A. The position the ship was going into.

Q. What did the Plymothian do? A. Nothing I could see, but come around on his port-helm all the time.

Q. Where did that take her? A. Foul of the Victory.

Q. Could the collision have occurred if that movement had not been made? A. No, sir, impossible.

Q. Before that movement, how had the Plymothian been moving? A. She came right out of the docks and passed our ship, which was on the W. side of the river.

Q. Was there any channel room unobstructed on the W. side of the river to admit of the Plymothian passing safely down the river? A. No, sir.

Q. Why was there not channel room on the W. side of the river to admit of the Plymothian passing down the river? A. I don't know why there wasn't room.

Q. Did you see a sch'r moving down the channel ahead of the Plymothian? A. Yes, sir, a little on the Plymo-
(45) thian's starboard bow.

Q. Did you see the buoy lines on W. side of ship channel down towards Craney Island from the Princess? A. Yes, sir.

Q. Was there no room in the ship channel between that line of buoys and that sch'r for the Plymothian to pass down the channel in safety? A. Yes, sir, plenty.

Q. Did you see these river steamers going down channel and passing between that bouy line and that sch'r before the Plymothian made her movement across the channel? A. Yes, sir.

Q. Suppose the Plymothian had done as they did? A. Nothing.

Q. Would any collision have happened if the Plymothian had done as they did? A. No, sir, not with the Victory.

Q. With what vessel would it have happened? A. Well, I could't say. He might have been silly enough to have run over some oyster boats, specially when he did the trick he did.

Q. What trick? A. By putting his vessel foul of the Victory.

Q. If the Plymothian had passed between the sch'r and

the western buoy line of the main channel, was there any reason why she should collide with that sch'r, or with any other vessel that you saw? A. No, sir.

Q. You have previously stated that on W. side of the river there was room for small vessels to pass, but not for large steamers. Did you then refer to the channel space between buoy lines or to the water between the W. buoy line and the W. shore? A. The W. shore—*i. e.*, space be-
(46) tween W. buoy line and W. shore.

Q. On which side of main ship channel was Victory moving on her way from Craney Island to the point of collision? A. Close on E. side.

Q. What whistles, if any, did you hear from the Victory? A. Two blasts.

Q. Was that all? A. I heard two blasts several times from Victory.

Q. Did you hear any answer to them from the Plymothian? A. Just before the collision I heard a very faint whistle; wouldn't have known that the whistle was blowing if I hadn't noticed steam escaping from whistle pipe.

Q. How many blasts then did you hear? A. I only heard one.

Q. Had the Plymothian at that time made that movement across the channel towards Victory that you have previously described as a trick? A. She was close on top of Victory.

Q. How did whistles from Victory sound; I mean in matter of distinctness, clearness and loudness. A. They were very clear and loud.

Q. Was that faint single blast from Plymothian sounded when she was nearly on top of the Victory an answering signal to the two loud blasts from the Victory? A. I don't think it was. I don't think they knew themselves. The officers on bridge of Plymothian r*u*n from one side of bridge to the other.

Q. What did that indicate to your mind? A. That they had all lost their sense on board her.

(47) In your judgment at the time or now was that feeble whistle from the Plymothian a sufficient or proper answer or signal to the two signal whistles from the Victory? A. I think not.

Q. Was it easy to hear from the distance you were off? A. No, sir; I could only see the one puff of steam.

Q. After the Victory sounded her signal whistles, and after the Plymothian commenced that change of movement across channel toward her, what did the Victory do to prevent collision? A. He reversed his engines. I could see by the backwater from propeller come up along ship's side.

Q. What did that indicate to you; that the Victory was going ahead, standing still, or going backwards? A. Not being aboard the ship I could not see whether he had headway, sternway or stopped; but before they collided she seemed to be getting sternway on her, that was the Victory.

Q. In that situation was there anything that the Victory should have done to prevent or ease the collision that she left undone? A. No, sir; none in my ideas.

Q. How about porting her helm? A. Probably she would have gone over top of a schr. and drowned all hands.

Q. Was that the schr. that you have before referred to? A. Yes, sir.

Q. In that situation ought the Victory to have ported her helm? A. Not unless he wanted to run the schr. down and drowned the crew.

Q. Did the Victory at any time at or before that collision (48) commit any fault or mistake in her navigation that helped to bring about that collision as far as you could observe? A. No, sir, she did not.

Q. How did that eccentric movement of the Plymothian across the channel put her in respect to the bows of the Victory? A. He put himself right across the Victory's bows.

Q. Did you see anything in the situation of any kind whatever that in your judgment excused or justified in making that movement across channel towards Victory that you have referred to? A. No, sir.

Q. Did I call here this morning to ask you to tell of the collision? A. You called this morning to ask me what I knew of the collision.

Q. And did you tell me what you have testified to under oath? A. I didn't tell you all, such as tricks, &c.

Q. Did you tell me the substance and the main facts? A. Yes, sir.

Q. Had you ever seen me before or heard from me? A. No, sir; perfect stranger to me.

Q. Did I ask you then what other officers and crew were on deck at time of collision, and did you name them? A. Yes, sir; 2nd engineer and 2nd officer.

Q. And did you send them to me to question them if I desired it? A. Yes, sir.

Cross-examination; without waiving the objections heretofore noted, but expressly insisting thereon.

(49) Q. What other conversations have you had in respect to the facts of this collision, when and with whom? A. With the captain and 2nd and 3rd engineer, amongst ourselves, and the 1st engineer.

Q. Any one else? A. Steward. I think I passed my opinion to him about it.

Q. Any one or more persons not an officer or member of the crew of this vessel; if so, when? A. No, sir.

Q. Do you know Capt. Murray, of Str. Abergeldie, or have you had any conversation with him in regard to this collision? A. I neither know Captain Murray or the ship.

Q. Did you not state to Captain Murray, of Str. Abergeldie, that you saw the whole thing as it occurred, and that the Victory was in the wrong; and did not this conversation take place the very afternoon of the collision? A. No, sir; as I said before, I do not know the Capt. of the Abergeldie, and no stranger had been aboard this ship that day except when the Capt. of our ship came aboard that night he brought the Capt. of the Wanderer and transacted some business with him in the cabin. I have not been off the ship since we arrived here.

Q. Did not this conversation take place when Capt. Murray was on vessel that passed by or came alongside your vessel that afternoon? A. Not with me. There was no vessel alongside that afternoon.

Q. About how far from you did the collision occur? A. About 4 or 5 ships' lengths; this ship is 300 feet long.

(50) Q. How far from you was Plymothian when she sounded her first whistle? A. Some distance, close on top of Victory.

Q. Had you heard any other whistle from Plymothian before that time? A. No, sir, except when she came out from dock.

Q. What whistle did you then hear from her? A. I couldn't say whether it was one or twenty.

Q. How far was Victory from when you heard her first two blasts, and how near Craney Island Light-house? A. Four or five ship's lengths from the scene of collision. How far from Craney Island I can't say; that is two far from me to judge of distance.

Q. How often have you been to this port and do you know the channel of this river? A. This is only my second time in Norfolk, and all I know of channel is by seeing the marks on it and seeing the ships pass up and down.

Q. Your knowledge, then, is not as exact in that particular as it is in matters of whistles and navigation generally? A. No, sir, not in this river.

Q. Do you know of the draughts or the routes of the river steamers you observed passing down before the collision and how those routes vary according to their exact destinations? A. I don't know, sir, but they seemed to be

drawing as much water as the Plymothian, but where they were bound to I don't know.

Q. She is a large ocean-going steamship, is she not? A. She is not so large as this ship. She is an ocean-going vessel I suppose. I don't know. She is not so large as this ship as far as appearance goes.

(51) Q. You have been questioned by the counsel for libellant as an expert in navigation. State, now, what is proper in steamers navigating rivers such as the Elizabeth in respect to which side of the channel to take? A. The river Elizabeth I know nothing about, but other rivers it is green to green, red to red, perfect safety, go ahead.

Q. Is it not a well recognized rule of river navigation for steamers to keep their own starboard side of the channel? A. Not in all countries it is not; as I said before, the rules of this river I don't know.

And further this deponent saith not.

JOSEPH SOUTH,
Chief Officer.

DAVID RANKIN being duly sworn, deposes and says:

Name David Rankin, age 23, Sunderland, England, is his home, 2nd engineer of Princess, 9 years an engineer, seagoing engineer 3 years.

Q. If the Princess goes to sea to-morrow will you go in her? A. I'll go when she goes.

Q. Did you see collision between Plymothian and Victory on 12th November, between Craney Island and Lambert's Point? A. Yes, sir.

Q. Where were you at time? A. On bridge with mate and 2nd officer.

Q. What whistles did you hear from Victory? A. I couldn't exactly say, two together at short intervals.

Q. Did you hear that signal of the Victory repeated? (52) A. I couldn't swear I heard her whistle twice. My hearing is a little dull in one ear, but I can hear whistles.

Q. Did you hear Plymothian give any whistles? A. I heard her give one very weak one. I remarked to mate at time that she had a very poor whistle.

Q. Where was the Plymothian when she sounded that whistle to Victory? A. She was making right in for the Victory's bows then, she had taken a curve.

Q. Before the Plymothian made that curve movement on which side of river was she? A. On port side of river going down.

Q. After she made that curve movement on which side of river was she? A. She landed on starboard side of the river.

Q. Did you see the Victory make any movement backward or forward after that curve movement? A. I see her go full speed astern.

Q. Could you tell whether she was making any stern way after this? A. Yes, sir; I should think she was, as she did not seem to have much headway at first.

Cross-examination: without waiving any objections heretofore noted in caption, but expressly insisting thereon, proceeds to cross-examine.

Q. How far were you from scene of collision? A. About quarter of a mile, I should think.

Q. How far was the Plymothian from you when she blew that whistle? A. About 300 yards.

(53) Q. Did you hear her blow a whistle when she left Lambert's Point? A. I can't say that I did. I wasn't taking so much notice of her then.

Q. How far was the Victory from you when you heard her two blasts? A. About ¼ mile.

Q. What was the angle of collision at which vessels came together? A. The Plymothian dropped right broadside on to the Victory's bows.

Q. How was the Victory heading as regards to you? A. I was a little on her starboard bow.

Q. And the Plymothian was on this side of her? A. Yes, sir.

Q. You have had no conversation with the Capt of the Abergeldie, have you? A. No, sir; with no one excepting our own mate.

Q. This morning did I come aboard the Princess and ask questions about this case? A. Yes, sir; just what I have stated, that is all the conversation.

And further, this deponent saith not.

DAVID RANKIN.

DISTRICT COURT OF THE UNITED STATES,
(54) Eastern District of Virginia.

L. Elcoate, Complainant,
vs.
Steamer "Plymothian," Defendant. } In Admiralty.

To Allan Mardon as master of the steamer "Plymothian":

Take notice that at 3 P. M., on the steamer Princess, now lying near Lambert's Point, I shall take the depositions of Joseph South, David Rankin and Robert Wigham, to be read as evidence on behalf of libellant in the above entitled

cause. The said witnesses are about to proceed on a voyage to sea, and out of the jurisdiction of this court.

The said depositions will be taken before Allan R. Hanckel, a United States commissioner.

SHARP & HUGHES,
Proctors for Libellant.

A second copy of this notice, unsigned, was filed with these depositions as "Exhibit A" by counsel for respondent, and was endorsed on the back in the following language: "Served a little after 1 P. M."

(55) UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *ss.*

I, A. R. Hanckel, a Commissioner of the Circuit Court of the United States for the Eastern District of Virginia, &c., do certify that in pursuance of the notice hereto attached I took the above depositions at the time and place and for the purpose designated in said notice.

And I do further certify that at 1:20 P. M. on the 14th day of November, 1891, I handed to the master of the said steamer Plymothian a copy of said notice, which is hereto attached, marked "Exhibit A," but he declined to receive it; whereupon I immediately proceeded to the office of Lamb & Co., in the city of Norfolk, Va., and at 1:30 P. M. of the same day, served the said copy upon the said firm of Lamb & Co., agents of said steamer Plymothian.

I further certify that I am not of counsel nor attorney to either of the parties in the cause, in and for which the said depositions are taken, or interested in the event of said cause.

In testimony whereof I have hereunto set my hand this 14th day of November, in the year 1891.

ALLAN R. HANCKEL,
Commissioner, &c., of the Cir. Court E. D. Va.

(56) The depositions of the crew of the Steamship "Victory," taken on Saturday, December 5th, and Monday, December 7th, 1891, to be read as evidence in behalf of the said steamship.

WILLIAM C. CANDLISH, the first witness on behalf of the "Victory," being duly sworn, deposed as follows:

Examined by Mr. SHARP.

Q. What is you name, age, residence and occupation? A. William C. Candlish; born in 1859, Sunderland, England; first officer of the Steamship Victory.

Q. How long have you been first officer on her? A. I have been about two years. I was previous to that a first officer also. I have been on her as an officer about six years.

Q. How long have you been going to sea? A. Since 1874,
(57) as an officer since 1879.

Q. Who was master of the Victory during these six years of service on her? A. Captain Elcoate all the time.

Q. During that time has she sustained any collision or any accident? A. Never been in collision or any accident.

Q. Referring to the 12th day of November, 1891, which was the day of the collision between the Victory and the British Steamship Plymothian, between Craney Island and Lambert's Point, what was your position on that day? A. What was my position?

Q. Yes; what was your rank? A. First officer of the steamer.

Q. Did you see that collision? A. I saw the collision?

Q. Now specify the situations of the officers of that ship on the trip from Hampton Roads to the scene of the collision? A. The captain, pilot and third officer were on the bridge, the third officer at the wheel on the bridge. The wheel is in such a position that you can see right over the bow.

Q. The captain and pilot also on the bridge? A. Yes, sir; that is on the pilot bridge—all the way from Hampton Roads.

Q. You left Hampton Roads at what time? A. About 3:30.

(58) Q. 3:30 P. M.? A. 3:30 P. M.

Q. The collision occurred at what time by your clock? A. Quarter past 4 by our clock, set to apparent time, 75th degree.

Q. During that time from Hampton Roads up to and including the time of the collision, where were you? A. I was on deck superintending the falls, getting the ropes up and such like ready for going alongside the wharf. I was part of the time on the forecastle head just before the collision, and on the lower bridge.

Q. Who were attending to the navigation of the ship? A. There was the captain and the pilot on the bridge.

Q. Who was specially attending to the business of lookout at that time? A. The captain.

Q. Who made the reports as lookout? A. The captain.

Q. To whom did he make the reports? A. To the pilot.

Q. Who was in command of the ship? A. The captain.

Q. Who was navigating her under him? A. The pilot.

Q. And the third officer you say at the wheel? A. Third officer at the wheel.

Q. Where was the second officer stationed? A. At the
(59) after end of the vessel.

Q. Who was in charge of the men on the after part of the ship? A. The second officer.

Q. Now describe the trip of the Victory from the anchorage—from the time she hove anchor up to the time she was abreast of Craney Island, her speed, etc.? A. We hove up anchor—it was fine weather with southwest wind, and came along up in the usual channel——

Q. Did you pass any vessels? A. We passed several vessels.

Q. Did you pass any steamers? A. Just before we got *the* Craney Island we passed a brown steamer. We passed him to starboard.

Q. Did you pass any river steamers? A. We passed after that a river steamer to starboard; she blew two whistles to us, and just at or about Craney Island we passed another river steamer. She also blew two whistles and passed to starboard. After that we passed another steamer also, blowing two whistles. That's below Craney Island.

Q. Did all those steamers blow two whistles? A. Yes, sir, to which we replied with two whistles.

Q. Did you hear the reports of these at the time? A. I did not hear all of them, I heard one or two. I was on the lower bridge. I was not in position to hear the rest of the time.

(60) Q. On which side of the ship channel did those steamers move as you were coming up? A. The steamers going down moved on the western side of the channel, or nearer mid channel, forcing us to keep to the eastern side.

Q. They were on the western half? A. The western side of the mid-channel.

Q. Which forced you to keep to the eastern side of the mid-channel? A. Yes, sir.

Q. Well, after passing Craney Island, did you see any sail vessels passing; if so, describe them? A. I saw two schooners coming down, they were to the eastern side of the mid-channel, and we had to starboard our helm a little to keep to the east of them.

Q. Were they abreast of each other, or ahead of each other? A. One ahead of the other. We passed both of them on the starboard side.

Q. And they were on the east of the middle line of the channel? A. I should *them* them to be about mid-channel, or thereabouts.

Q. Which side were you? A. We were east of the schooners, between them and the shore, rather near the buoy line than the schooners.

Q. What induced the Victory at that time to take the eastern side of the channel? A. Couldn't get to the other (61) side.

Q. Why not? A. Those steamers were all going down, and gave us two whistles; they were evidently crossing the flats, and bore to the west to cross the flats, and gave us two whistles.

Q. And you say you had to starboard the helm of the Victory in order to keep clear of those schooners on the starboard bow? A. Yes, sir.

Q. They were going down? A. Yes, sir; down channel.

Q. How close to the eastern line of the main channel did the Victory keep at that time? A. Well, from my observation I should think maybe 40 or 50 yards; something like that.

Q. Was she at any time in the mid-channel after passing Craney Island? A. Never, before the collision.

Q. She was always in the eastern part? A. Yes, on the eastern side, and well to the east, up to the time of the collision.

Q. And as close as 40 or 50 yards to the eastern line of the main ship channel? A. Yes, sir.

Q. Now go on and describe what happened when you were approaching or passing either or both of those schoon- (62) ers; go on and describe the course of the Victory? A. We were coming up a pretty fair channel course, keeping up the line on the eastern side, and those schooners were going down a little on the eastern side of the mid-channel. One was following close in the wake of this river steamer.

Q. Which one was that? A. That is the first one. We couldn't go across him; he was too close to the steamer, and therefore we had to keep on the port side of the channel. The second schooner was steering to the ——, she was not far enough off for us to get across his bows, either.

Q. Did you hear, if so when, any whistles from the Victory? A. I heard her blow two whistles to each of those steamers.

Q. After that time, after blowing to the river steamers, did the Victory blow to the schooners? A. No, sir, I think not. I didn't notice it if she did.

Q. Did you hear, after that, any whistles from the Victory to any other vessel or steamer; if so, describe it? A. I heard two whistles.

Q. What whistles were they? A. Two short blasts of our steam whistle.

Q. Did you hear any reply to them? A. No, sir, no reply. Then I heard other two whistles from our steamer.

Q. Did you hear any reply to them? A. I heard no reply.

Q. Describe those whistles in the matter of clearness and (63) *and* sound? A. They were loud, clear, and distinct whistles—nothing the matter with them.

Q. Could they be heard at any considerable distance? A. Yes, sir.

Q. Previous to the blowing of those whistles, did you hear any whistles or signals from the south to the Victory or any other vessel? A. I heard several other whistles blowing there at a distance. There were some tug boats around Lambert's Point blowing, but they were too far off to be a signal to our vessel.

Q. There were some tug boats hovering around Lambert's Point that were blowing? A. Yes, sir, and a locomotive was also blowing around there.

Q. Besides those, did you hear any whistles from the south? A. No, sir; that is all I heard.

Q. Did you hear any answer to the whistles of two each which were given in a loud, clear, and distinct manner from the Victory? A. No, sir, I did not.

Q. Well, after the Victory repeated her signal of two whistles what did she do? A. Rang the telegraph full speed astern and blew three whistles.

Q. What did that indicate? A. That she was going astern full speed.

Q. Well, did she go astern full speed? A. She went (64) astern full speed. I could tell that by the shaking of the ship.

Q. For how long was she going astern? A. Four or five minutes; something like that.

Q. As many as four minutes? A. Certainly four.

Q. And perhaps five? A. Perhaps five.

Q. At the time the Victory commenced to reverse her engines, say four or five minutes previous to the collision, where was she; describe her position? A. She would be about 300 or 400 yards to the north of buoy number 7.

Q. And how close to the eastern line of the main ship channel? A. Well, the two buoys were almost in a line, number 7 and 9. We were a little to the east of the two buoys.

Q. How far from the buoy line do you suppose she was to the east of at the time? A. Between 30 and 40 yards I suppose, sir.

Q. 20 to 30 yards to the east? A. Yes, sir; 30 or 40 I said, sir. Of course you cannot judge that accurately.

Q. You cannot judge with any accuracy, but from 30 to 40 yards? A. Yes, sir.

Q. You have previously stated that she was from 30 to 40 yards from the eastern line of the ship channel coming
(65) from Craney Island; why was she from 30 to 40 yards to the east of the buoy line when she was from 300 to 400 yards north of the collision? A. We had to starboard a little for the first schooner, to give him a clear berth.

Q. Then the Victory starboarded a little? A. Yes, sir, and afterwards steadied on her coast.

Q. And that slight starboarding placed her rather nearer to the eastern line of the main ship channel? A. The eastern line.

Q. When the Victory was moving on the eastern side of the main ship channel, before her engines were reversed, how was she heading—for what object was she heading? A. Before her engines were reversed?

Q. I say, before her engines were reversed, for what object was she heading? A. To pass a little to the east of number 7 buoy.

Q. You were not in position to see how she was steering? A. I was not on the bridge and couldn't see the compass.

Q. But she was heading a little to the west of number 7 buoy? A. I meant to the west of the number 7 buoy. I think I said east.

Q. Did you say just now to the east of the two buoys? A. I think I did say to the east, but I made a mistake; I meant to the west of the line of the two buoys.

Q. You have stated that the Victory when about 300 or
(66) 400 yards to the north of the scene of the collision began to reverse her engines at full speed. Now state whether she continued to do so or not, after that time, and if so, how long? A. She went full speed astern right up to the moment of collision—about four or five minutes.

Q. How was the tide? A. The tide was about half flood.

Q. How was it in the matter of strength or weakness? A. It was running, I suppose, about two or three knots an hour—two knots, maybe.

Q. Did it make much current? A. Yes, sir. Of course it would be about two knots current, I should think.

Q. Is that a strong current? A. Well, it may be considered strong in the Norfolk river, but it is not what you would call a strong current.

Q. What effect did the tide have upon the movement of the ship before the collision, if any? A. Before the collision?

Q. Either before or during those four or five minutes did the tide have any effect? A. It canted her stern off towards the middle of the channel a little.

Q. How would it make her head? A. Towards the shore after the engines were reversed.

Q. Did that continue during all the time that the engines were reversed or not; state what happened? A. It didn't (67) continue all the time. As soon as she commenced to feel the propeller she began to cant her head the other way, to starboard.

Q. Describe what you mean by her beginning to feel her propeller? A. Of course if a ship has headway on her and begins to go astern it makes so much resistance.

Q. As soon, then, as the propeller's backing influence was felt she began to slew her head somewhat to eastward? A. Yes, sir; that was immediately before the collision; I observed her head was going to the starboard a little.

Q. What was the direction of her head? A. Heading straight for the lighthouse on Lambert's Point pier.

Q. Was she heading more or less to starboard, that is, to the west, at the time of the collision than she had been before? She was heading a little more to the west than she had been before.

Q. Why? A. On account of putting the helm hard a-starboard and the propeller making itself felt.

Q. When? A. Just when she stopped.

Q. Do I understand you to say that her headway was checked before her helm was put hard a-starboard? A. Yes, sir.

(68) Q. How much was it checked before the helm was put hard a-starboard? A. She was almost stopped. I should say she was stopped as far as a person could observe from the deck; to all intent and purposes she was stopped.

Q. And then, at the time she was stopped or almost stopped, her helm was put a-starboard? A. Hard-a-starboard.

Q. For what purpose? A. To make her slew into the line of the channel again.

Q. Would that be effected by starboarding her helm at that time? A. Certainly; help the propeller to do it.

Q. Why? A. Because the ship was beginning to go astern, and it would be the opposite effect to going ahead.

Q. Then, when a ship is going ahead, whether her engines are reversed or not, do I understand you to say a port helm would make her cant her head to starboard, and when she is going back it takes a starboard helm to do that? A. Exactly, sir; it is just opposite.

Q. As I understand then, for about four or five minutes before the collision, and at the time when the Victory was about 400 or 500 yards north of the collision, which was off buoy number 7, she commenced to reverse her engines? A. Yes, sir.

(69) Q. And was reversing until her headway was stopped? A. She was reversing, going full speed astern right up to the time of the collision, and went astern a little afterwards.

Q. And her helm was to starboard as soon as her headway was checked and stopped? A. Yes, sir.

Q. And for the reason you have just given? A. Yes, sir.

Q. Did you observe whether the ship, after the starboarding of her helm, moved backwards at all? A. I should say she did, as far as my observation went.

Q. Tell how far it went? A. How far the ship went?

Q How long; state your observation? A. Of course I hadn't much time to make observation, but I should think, looking at the back wash along the ship's side, she was moving astern.

Q. Can you state with positiveness she was not going ahead? A. I can say with certainty she was not.

Q. How far was the back wash? A. Abreast of our number 3 hatch.

Q. Is that forward of the midships? A. Forward of the midships 30 or 40 feet.

Q. The backwater being at the time of the collision forward of the midships? A. Yes, sir, 40 or 50 feet.

(70) Q. Which you observed? A. Yes, sir.

Q. You feel confident she was going backwards? A. I feel confident she was not going ahead.

Q. Does that back water indicate that the engines are being reversed merely, or that the ship is moving bodily backwards? A. Of course there will be a certain point where it will indicate that the ship is going astern, but I couldn't state with certainty where that point is.

Q. Now say when and where you first saw the Plymothian? A. My attention was first drawn to the Plymothian by the second of our two whistles.

Q. The second of your two whistles? A. The second of our two whistles.

Q. Well, describe—— A. I first saw her on the western side of the channel; I suppose it would be three and a half points or something like that, on our starboard bow.

Q. Describe her movement at that time? A. She was then under the influence of port helm, and her head was canted then to starboard across the channel.

Q. Heading about what direction? A. She would be then heading, I suppose, about N. N. E.; something like that.

Q. Well, under that port helm, what did the Plymothian do? A. She continued on her port helm right across the channel.

(71) Q. To what point? A. Right across our bows.

Q. Right across the bows of the Victory? A. Yes, sir.

Q. The collision occurred where? A. Close to number 7 buoy. Number 7 buoy was foul of the Plymothian's starboard bow—had it right under his bow, on the opposite side.

Q. The collision, then, was close to buoy number 7. A. Close to buoy 7.

Q. Which buoy is on the east line? A. The buoy is on the east line of the channel.

Q. You mean the main ship channel? A. The main ship channel.

Q. And when you first saw the Plymothian she was on the western side of that channel? A. Yes, sir, on the western side of the channel.

Q. And moving across the channel? A. Moving across the channel.

Q. Heading, you say, about N. N. E.? A. Thereabouts. I hadn't a compass there to guide me.

Q. That is your judgment? A. Yes, sir.

Q. And she actually came from across the channel to buoy number 7? A. Yes, sir.

Q. And got afoul of that buoy? A. That buoy was under her starboard bow when she drew astern after the (72) collision.

Q. Do I understand you as having previously stated that at the time of the collision the Victory was certainly not moving forward, and was probably moving backward? A. Just that, sir. She certainly was not moving forward.

Q. And heading slightly to the eastern shore? A. To the east.

Q. But that her head was slightly canting from that shore to the channel? A. At the moment of collision her head was slightly canting to the west, not moving with any rapidity.

Q. As I understand, that Victory was not stationary; she was slowing or canting a little to the westward? A. Yes, sir, a little, but very slowly.

Q. Upon the approach of the Puritan from the western side of the channel to the scene of the collision on the eastern side, heading about N. N. E., while on that movement did you hear any whistle or whistles, signal or signals from the Plymothian? A. No, sir, I never heard a whistle.

Q. What did she do just before the collision and at the collision—describe the collision, and where were you at the time? A. At the moment of collision I was looking right over our stem.

Q. Where were you then? A. On the forecastle head.

(73) Q. In a position to see clearly? A. To see everything.

Q. On that ship could you, if on the main deck, without looking over the rail see her? A. No, sir.

Q. Why? A. Her bulwarks are too high. You could see anything passing when it got a couple of points abeam, but you couldn't see ahead.

Q. Is that true also of the Plymothian? A. That I couldn't say.

Q. The bulwarks are high on the Victory? A. Yes, sir.

Q. Seamen, then, on the forward deck of the Victory would not be able to see ahead except by looking over the rail? A. No, sir.

Q. And you got up on top of the forecastle head? A. Yes, sir; I went from the lower bridge.

Q. How far off was the Plymothian at the time you took position on the forecastle head? A. She would not be more than two ships' length.

Q. Two lengths of your ship? A. Yes, sir.

Q. What is the length of your ship? A. 330 feet.

Q. At that time, suppose the Plymothian had starboarded her helm? A. I think he would have gone clear of us; he (74) would have had a better chance then of escaping.

Q. Suppose she had backed at that time? A. I think it was too late then, but if he had backed when we backed, he certainly would.

Q. It was too late to clear by backing? A. When I got on the forecastle head.

Q. But there was time then for her to have cleared by starboarding? A. I think she would, sir.

Q. Did she keep on? A. She kept on under port helm, going about four knots an hour, in my judgment.

Q. Four or less, or four or more? A. About four.

Q. What parts of the ships came in contact with each other; describe how they came together? A. The Plymothian's port broadside, just a little in front of her midships, came into contact with our stem. He was under the influence of his port helm then at the time, and swinging rapidly on his port helm, the effect of the blow was to drive the Plymothian on to our stem. One of his plates at the after part of the hole that was made in him by the collision, was forced through our starboard bow, clean through, and broke two frames on the port bow, and jammed itself there so that it took three men two days to get it out. That was the effect (75) of his headway. At the same time, the forward part of the break forced our anchor through just immediately above on the port side, where this plate had driven it out; so there was a break in and a break out on the port side—

the upper part of the hole was broken in by the anchor, and the lower part broken out by his plate.

Q. As I undrrstand, then, from you, the port side of the Plymothian struck against the stem, the point of the stem of the Victory? A. Yes, sir; exactly.

Q. At a time when the Plymothian was swinging rapidly under a port helm? A. Yes, sir; with four knots headway.

Q. And at the time when the Victory was either standing still or moving backward a little? A. Exactly, sir.

Q. And slightly canting to starboard? A. Yes, sir.

Q. And that the effect of that blow was not merely to injure the Plymothian, as it was done. but to drive one of her own plates clear through the Victory from her starboard bow to her port bow? A. Exactly.

Q. Clear through the ship? A. Yes, sir.

Q. You have stated that that was the effect of her headway? A. Yes, sir.

(76) Q. What does that indicate to you in the matter of speed? A. It indicates her to be going at the speed I put her down at.

Q. How many miles? A. About four miles.

Q. Suppose the Plymothian had not been moving, could she have driven one of her plates clear through the Victory? A. No, sir; certainly not.

Q. It was not her stem that struck the Victory? A. No, sir; it was her broadside.

Q. How long was that plate? A. We have got that plate on our deck now. Maybe it is 3 feet by 4 feet, or bigger than that.

Q. How wide? A. It is, I suppose, 4 feet long—5 by 4, as far as my memory carries me. It is a double plate riveted together.

Q. A plate 5 feet long and 4 feet wide, a double plate riveted together, a part of the port side of the Plymothian, was driven clear through the Victory, from her starboard side to her port side? A. From her starboard side to her port side.

Q. Did it stick in the port side or fall? A. It stopped there. When she drew ahead it drew that plate out about six inches from the place it was originally, when he broke it off, and the mark was there where it was originally driven to.

Q. Then the Plymothian was going ahead? A. I couldn't (77) tell how fast, but the headway was not stopped.

Q. And the effect of continuing her headway was to break off that plate? A. Yes, sir

Q Leaving in the Victory a piece 5 feet by 4 feet. A. Yes, sir.

Q. And that passed through your starboard side? A. Yes, sir.

Q. How far from the stem? A. Right by the stem. It broke about 5 or 6 feet down there.

Q. How many feet aft of the stem? A. The hole made in our ship would be about three feet from the stem—the after part of the hole—and this plate was blocking the hole up after the collision.

Q. You mean there was three feet between the front of the hole and the stem that was not injured—the hole was abaft three feet? A. No, sir; the break extended from the stem abaft three feet from the after part of the stem.

Q. The wound, then, to the Victory was abaft the stem? A. Yes, sir.

Q. And continued for about three feet, you say? A. Yes, sir.

Q. Further on abaft the stem? A. Yes, sir.

Q. And that plate went through the starboard bow of the Victory and lodged in the port bow of the victory? A. Yes, sir.

(78) Q. Lodged there? A. Forced itself in behind the frames and angle irons.

Q. Did it stick out? A. It was broken from our bow a few inches.

Q. And the hole in the Victory was on both bows?. A. Hole on each bow. Two holes.

Q. I am speaking of that hole—the hole made by that plate continued from one side to the other, and made a hole on each side? A. Yes, sir.

Q. So you could look right through the ship? A. You couldn't look exactly through, it hadn't entirely broken the plates out.

Q. The hole was choked by the plates, but if they were not choked by the plate you could look right through the ship? A. You could see in some places, but it want as much in the port side as the starboard side.

Q. But it went right through the sheathing of the Victory? A. It went through, bulging the plates on the port side from the frames, and stuck there.

Q. Lodged between the plating and the frames? A. Yes, sir.

Q. Could that wound have been inflicted on the Victory by a vessel not moving? A. It certainly could not.

Q. Could it have been inflicted by a vessel not moving rapidly? A. No, sir.

(79) Q. Could it have been inflicted by a vessel that was not moving with a great deal of headway? A. She had to have a good way.

Q. You have spoken of the Victory being wounded on the port bow by the anchor. Describe how that happened? A. Our anchor was hanging to the hawse pipe——

Q. On the port side? A. On the port side. When the Plymothian fell across our stem and broke his side in, the forward part of the hole pressed that anchor in the port bow just immediately above the forward part of the hole that was broken. It fell upon this anchor and forced it inward at the same time that the plate was forcing it outward.

Q. You mean the forward part of the hole on the port side or the starboard side? A. Port side.

Q. And that was done by the blow from the Plymothian to the Victory? A. That was done by her falling on our stem.

Q. In respect to the compass, as far as you can judge, how was the Victory heading at the time of the collision, and how was the Plymothian heading? A. Well, the Victor's head was directly pointing towards Lambert's Point Light-house. The Plymothian was at an angle across our course of maybe a point, or two points, an obtuse angle, a little more than a right angle of us, not going directly across the river, maybe a point more. Do you understand (80) what I mean?

Q. I do not. Just take that piece of paper and describe it? The witness draws a diagram of the position of the vessels, which is annexed to the record marked exhibit "A." A. The Plymothian was heading right that way, a little more than a right angle, and swinging under port helm she came down and struck us on our stem right that way.

Q. What officer was in charge of the after part of the ship? A. The second officer.

Q. Where would his station be? A. Around the poop. He was getting the ropes and things ready to go alongside the wharf.

Q. The stations of your men, then, was as follows: The master in command of the ship and the pilot helping the navigation and the third officer, all on the bridge? A. All on the bridge.

Q. And the third officer at the wheel? A. Yes, sir.

Q. The master on the lookout—did he communicate with the pilot? A. Yes, sir, I heard him several times telling the pilot about the steamers coming down.

Q. And the second officer aft and you forward? A. Yes, sir. I was on the fore part of the bridge most of the time, and I was occasionally on the forecastle head as well.

W. Did you hear any danger signals from the steamer (81) Plymothian as she approached? A. Never heard a whistle from her, and never noticed any steam coming from his whistle, personally.

Q. Did you see, or was there an opportunity for the Victory to escape a collision with the Plymothian at the time that the Plymothian was approaching her? A. No, sir.

Q. Why not? A. We had no other alternative but to go astern.

Q. Why not? A. Because if we had ported our helm we would have run a schooner down.

Q. What schooner? A. Schooner on our starboard side, and if we had starboarded our helm we would have run ashore.

Q. Suppose you had heard whistles of any kind from the Plymothian at the time the second whistles were given from the Victory, could the Victory have starboarded or ported to have accomplished any good result? A. No, sir, it would have been a very risky undertaking to try to go between those two schooners; no sensible man would have done it.

Q. Could any man, however skillful, have avoided the bank if he had gone under starboard helm? A. No, sir, would have gone ashore.

Q. There was nothing, then, to do but to reverse the engines of the Victory? A. That was our only alternative.

Q. And was that done promptly? A. That was done (82) promptly, as soon as the Plymothian was observed coming across the channel and in a dangerous position.

Q. Was that done at full speed? A. As well as I could judge by the shaking of the ship, and I saw the telegraph on the bridge say full speed astern.

Q. And at what time? A. Four or five minutes. It was certainly four.

Q. Are you positive that the Victory did not at any time leave or attempt to leave the eastern side of the channel? A. She never did, sir.

Q. Was she at any time from Craney Island up to the scene of the collision in or near the middle line of the channel? A. She was on the eastern side all the time.

Q. And never attempted to leave it? A. Couldn't leave, because of those craft going down.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES.

Q. Where were you stationed when you passed Craney Island light? A. I am chief officer.

Q. Where were you stationed coming up the river, when you passed Craney Island? A. I was seeing the ropes and things were ready for coming up to the wharf, forward on the lower bridge.

Q. How far is the lower bridge from the stem of your vessel? A. About 100 feet; maybe a little more.

(83) Q. How did you get from your bridge to the stem of your vessel? A. Along the fore and aft bridge.

Q. Along the fore and aft bridge? A. Yes, sir.

Q. Describe how your bridges are constructed? A. We have a bridge from the forecastle head right to the bridge, running fore and aft.

Q. To the pilot bridge? A. To the lower bridge. The pilot bridge is seven feet above that.

Q. And you were stationed on the lower bridge attending to this work at the time you passed Craney Island? A. Yes, sir; I was there at the time.

Q. At what point did you pass the first steamer you mentioned? A. Below Craney Island.

Q. How far below? A. I couldn't exactly say that; I didn't take particular notice. Maybe half a mile.

Q. Was she going down the main channel of the river, or had she turned off to the flats? A. She was going down the main channel then, but altering her course to starboard all the time, to cross the flats, I suppose.

Q. At what point in the channel had you been before passing that steamer? A. We were on the eastern side before that.

(84) Q. Thereupon this steamer gave you two whistles and you passed starboard to starboard? A. Starboard to starboard, sir.

Q. Where did you pass the second steamer you have mentioned? A. Just at or about the light.

Q. And you passed her starboard to starboard? A. Yes, sir.

Q. At what point of the channel was she moving, or along what line of the channel? A. I should think she was a little to the west of the middle line of the channel; we passed him about 60 or 70 yards; we were to the east of him 60 or 70 yards.

Q. You were to the east of him 60 or 70 yards? A. Yes, sir.

Q. How far to the east of the middle line of the channel? A. He was a little to the west of it by a few yards, maybe, or just about the middle line of the channel, which put us pretty well over to the eastern line of the channel.

Q. Where did you pass the third steamer you have mentioned? A. I should think she would be a third of the way or a little more than that between the scene of the collision and the light-house.

Q. What course, in the meantime, had you been working on? A. As far as my observation told me from looking at

the buoys and the line of the channel and the ships coming up and down, we were steering a pretty straight course up the line of the channel. We did bear a little bit to the (85) starboard for this schooner, maybe a point, and then straightened up again.

Q. How close did you pass to the third steamer? A. Maybe 30 or 40 yards from her, maybe more; I was not paying any particular notice to him.

Q. How was she with respect to the middle of the channel? A. Same as the other; he was a little to the west side of the mid-channel.

Q. How did you say the wind was? A. There was a light breeze from the southwest.

Q. How was that schooner moving? A. The schooner was moving down the channel with the wind on his port quarter.

Q. How in respect to the middle line of the channel? A. Going right straight along it, as far as I could see.

Q. And close aboard the steamer? A. He was a little to the eastern side of the middle of the channel.

Q. I am speaking of the river steamer? A. I couldn't say how far those two were apart; he was certainly this side of him, certainly higher up the river; I couldn't say exactly how far.

Q. Well, at the time you passed the steamer, how far was the schooner from you? A. How far was the schooner from us?

Q. At the time you passed the third steamer? A. Well, (86) I don't know exactly, maybe 100 yards from us. I don't put that down with any certainty, because I was not interested in measuring the distance by any of the steamers. That is as far as my memory serves me.

Q. And you say you passed the schooner starboard to starboard? A. Yes, sir.

Q. How about the second schooner? A. Passed him starboard to starboard.

Q. How close was he to the first schooner? A. He may have been a ship's length; 300 feet or so.

Q. How was he going? A. Going down channel slowly right in the wake of the other.

Q. Going down channel right in the wake of the other one; how rapidly were they moving? A. They were not going very fast; two or three knots, with a light breeze.

Q. What speed did you make up to Craney Island, and what speed did you make after you passed Craney Island? A. I suppose we were going pretty close to 10 knots until we got close to the light-house, and then we slowed down, and were going maybe 5 or 5½.

Q. Do you signal your engineer by bells or telegraph? A. By telegraph.

Q. Did you see the telegraph ringing? A. Did I see it ringing?

Q. I mean ringing your vessel down? A. I heard the (87) telegraph ring; heard the bell in the engine-room when we went full speed astern. I was on the lower bridge, and went and looked at it and saw it was full speed astern.

Q. How about when you slowed down? A. I saw it again; I was on the lower bridge.

Q. At what point were you in the river then? A. Just a little below Craney Island.

Q. Your vessel, then, after passing Craney Island, was moving on the eastern side of the channel—at about five knots, did you say? A. Yes, sir, I should think about that; of course she had the effect of her headway still when passing the Island.

Q. Was that speed calculated with reference to her moving through the water, irrespective of the tide? A. That is through the water.

Q. At what point were you when the two whistles were blown? A. From the Victory.

Q. Yes, sir, from the Victory? A. I suppose it would be a matter of 400 or 500 yards from where we went astern.

Q. And you went astern from 300 to 400 yards to the north of buoy number 7? A. Yes, sir.

Q. At the time those two first signals were given, were you opposite the third steamer, the first or second schooner, or what was the closest vessel to you at that moment? A. (88) The closest vessel to us was the first schooner; she was right abeam of us.

Q. You were just then passing the first schooner? A. Yes, sir.

Q. How far to the east of the central line of the channel? A. I suppose about a couple of hundred yards; maybe less than that. We were about 40 yards from the eastern side.

Q. How close did you pass to the schooner? A. The schooner was about 20 yards from us.

Q. The schooner was about 20 yards from you? A. Yes, sir.

Q. How about the second schooner? A. It is the second schooner that I am referring to.

Q. You mentioned just a little while ago that it was the first schooner? A. We were a little further from the first schooner than the second schooner—maybe 30 yards from her.

Q. As I understand, then, you were only 30 or 40 yards

from the eastern edge of the channel when you passed those two schooners—the first within 30 yards and the second within 20 yards? A. Yes, sir.

Q. What called you forward from the lower bridge to the stem? A. I saw it looked very like there was going to be a collision and I went there, thinking an anchor might be needed.

Q. How long before that had you seen the Plymothian? A. Just a short time before that.

(89) Q. Had you been distracted by your other work, or were you at that time in a position to hear any signals given by her? A. I was right against the whistle and couldn't help hearing it.

Q. I mean by her? A. I was on the bridge, just a good position to hear.

Q. You are, then, in position to swear, and you do swear positively, that you heard no signals given from the moment you saw the Plymothian to the point of collision? A. I heard no signals from the Plymothian—none whatever.

Q. And if she had given any you would have heard them? A. I suppose I would. I was in a position to hear them.

Q. You would at any rate have observed the steam from her whistle? A. I most likely would; I didn't see any.

Q. You were looking at her, were you not? A. From the time I saw her until the moment of collision I did not lose sight of her.

Q. And you couldn't be mistaken in that respect? A. In what respect?

Q. In respect to hearing this whistle? A. I never heard her sound a whistle once.

Q. And that is as true as anything you have stated? A. That is as true as anything I have stated.

Q. And for a few moments preceding the collision you were on the stem of your vessel, and remained there until the collision? A. I was right there, and remained there

(90) until the collision.

Q. How far from buoy number 7 were you when you passed the second schooner? A. It would be about 400 yards, or a little more; of course I don't say I measured this distance, I am just judging from memory.

Q. You have also stated that when you were within 3 or 400 yards of buoy number 7 your engines were reversed full speed, and continued to be so reversed until the time of the collision? A. Yes, sir, and afterwards a little bit.

Q. And that fully four or five minutes elapsed from the time the engines were reversed, until the collision? A. Yes, sir, that is what I have said.

Q. You have been an officer for some time on the Victory, and are therefore able, are you not, to state whether she works easily? A. You refer to the engines, sir?

Q. I refer to her helm; does she obey her helm easily? A. We have got just about as good a bit of steering gear as was ever put on board a ship, and she answers just about as well as any boat I have ever been aboard of.

Q. You couldn't have wanted better steering gear on any vessel? A. No, sir.

Q. And you could not have wanted any vessel to have (91) responded better to that gear? A. That's so, sir.

Q. How far to the south of buoy number 7 did the collision take place? A. It occurred at buoy number 7, sir; buoy number 7 was under the Plymothian's bow, starboard bow, when the collision occurred.

Q. How far from buoy number 7 had you passed? A. We had not passed buoy number 7. Our stem was right abreast of it at the time of the collision.

Q. And how far distant? A. A little more than half the length of the ship. The buoy dragged around the Plymothian's bow after the collision, close around his stem.

Q. And that buoy is on the extreme edge of the main ship channel is it? A. Yes, sir.

Q. You have stated, Mr. Candlish, that the angle of the collision was an obtuse one? A. Yes, sir.

Q. Your vessel at the time moving backward, if moving at all? A. Yes, sir.

Q. The Plymothian coming into you at that angle? A. Yes, sir, answering her port helm.

Q. Swinging rapidly under port helm, explain if you can, how, if your vessel was moving backward the accident could have happened with the vessels coming together at an obtuse angle? A. Well, I don't know that I could explain it (92) without some sort of a diagram, or a bit of paper. (Witness draws a diagram of the position of the ships, in the same manner as shown on exhibit "A.") The vessels came together at a little more than a right angle, that's his ship and this is our ship; that ship is swinging on her port helm, you understand, she is coming that way, and it is just like a blow with a hammer on our stem; that is the end that is held in your hand (indicating on diagram), and that is the end that was swinging. It was a swinging blow and with about 3 or 4 knots headway.

Q. You say your vessel has excellent steering gear and answers it very rapidly; state in what distance under ordinary circumstances that vessel moving at 5 or 6 knots of way that vessel would swing two points to the starboard or to port? A. That is a thing I don't know that I could an-

swer. I could say if I was on the bridge if she was going to clear an object, but to say how long it would take to swing two points, I couldn't say, but I know she answers her helm very rapidly.

Q. Suppose your steamer was meeting another steamer, each moving with 6 knots way on, how far distant would your vessel have to move under port or starboard helm in order to clear that vessel approaching that same course? A. I don't underssand the question.

(Q.) Suppose you are coming head on to an object, at what distance would you be able to clear that object to starboard? A. You could do that in a pretty close distance—wouldn't have to be very far from it, but I would prefer not to experiment on that.

Q. Can you give any idea in distance? A. The distance it would take to clear it?

Q. The distance it would take to clear an object ahead? A. Coming as rapidly as we were and moving in an opposite direction; that is the question?

Q. Say that is the case? A. Well, I should get out of his way when I was 3 or 4 lengths ahead of him.

Q. Suppose he were to remain stationary, at what distance could you safely put your helm to port or starboard with the sureness of clearing her, you moving at 6 knots? A. Well, I suppose a couple of ship's lengths you might do it; but, as I said before, if I were in that position I would get out of the road entirely. We never try any of those tricks with a steamer 300 feet long.

Q. You say in a couple of ship's lengths; don't you think you could do it in less? A. No, sir; I do not.

Q. How long before the collision did you reach the stem? A. About two minutes.

Q. And you moved there as soon as you heard the second (94) signal of two whistles given? A. No, I didn't go directly I heard the *the* second whistles. I went after I heard the three whistles.

Q. You didn't move forward until you heard the three whistles? A. No.

Q. How long after the two whistles were given before the three whistles were given? A. It might be a minute or so.

Q. Immediately upon the three whistles being rung—A. I went forward. I saw the ship when the two whistles were blown—when the second two whistles were blown.

Q. But not when the first two whistles? A. No, sir, I did not.

Q. And after the three whistles were given? A. I ran forward.

Q. And was there two minutes before the collision hap-

paned? A. I was on the forecastle head a little bit more than that; I was not on the stem.

Q. You were on the forecastle head a little more than that? A. Yes, sir; I suppose it would be three minutes, as well as my memory serves me.

Q. And at what time was your helm put a-starboard? A. When our ship's headway was about stopped.

Q. How far were you from buoy number 7 at that time? A. We were not very far from it; pretty close to it.

Q. Well, give us the distance, in your judgment. A. I should say the buoy was bearing about east from us about a couple of hundred feet.

(95) Q. You were about abreast of the buoy then? A. About abreast of the buoy.

Q. When your headway was checked? A. Yes, sir; when I heard them sing out to put the helm a-starboard. I was then on the forecastle deck. The helm was not put a-starboard until the ship's headway was checked; in fact I didn't see her going ahead any after the helm was put a-starboard.

Q. And at the time you reached the forecastle deck you think the Plymothian could have avoided the collision if sho had starboarded her helm? A. Yes, sir. At the time I saw her porting her helm across the channel; when I got on the forecastle head, I believe she still had time.

Q. And what prevented you from porting your helm at that time? A. The schooner on the starboard side.

Q. Will you state what draft your vessel was? A. 17 feet 5 aft, and 10 feet 8 forward.

Q. And what is her length? A. I think she is 338 feet over all.

Examined by Mr. MYNDERSE:

Q. That schooner that prevented you from porting was the second of those two schooners? A. The second. At the time of the collision itself the schooner was on our beam, but then we couldn't port for the Plymothian. If we had gone on we would have run into her.

(96) Q. It was the second of the two schooners that prevented your porting for the Plymothian? A. Exactly.

Q. As I understand, you met three steamers before you came to Craney Island, and two schooners after passing— A. No, sir, we met a loaded steamer going down the channel, an English steamer, before getting to Craney Island, and met a river boat a little below the Island, one at the Island and one a little above it.

Q. Four steamers? A. Yes, sir.

Q. And two schooners? A. After we got past the Island.

Q. And it was the second of those schooners that prevented your porting? A. Yes, sir, that is if we were inclined to do it.

Q. You say the steering gear of your steamer was in good order? A. Good order—first class order.

Q. Had you had any trouble with it? A. Never had any trouble with it since I have been in the ship; 6 years.

Q. Have any trouble with the engines? A. No, sir.

Q. Have any trouble with the steamer outwards? A. No, sir.

(97) Q. Engines and boilers in good order? A. Never gave us any trouble.

Q. How long since you have had any trouble with the engines or boilers? A. I don't remember ever having any.

Q. During the 6 years? A. No, sir; I don't remember at this moment. I believe once or twice we burst a pipe, but I cannot remember when that was.

Q. Never heard any complaint of their operation? A. No, sir.

Q. Work readily, so far as you have heard? A. Yes, sir; always answer the telegraph at once.

Q. What speed do you have at sea? A. We go at sea usually about 9 knots; we can go close on to 10 loaded.

Q. What steam do you carry? A. I think we carry 80 pounds.

Q. Do you know when the boilers were put in? A. When she was new.

Q. Do you know any defect at all in the steamer, anywhere? A. No, sir, I do not.

Q. Has she been well kept all the while? A. Been well kept—plenty of stores and everything.

Q. How about her equipment? A. All right, sir, in every respect.

Q. When was she last under repairs? A. In the Tyne under repairs last summer.

(98) Q. And she got a high class at that survey? A. I couldn't tell you, I am sure.

Q. Do you know where the channel begins? A. Which channel?

Q. The channel you were coming up—where the beginning of that channel is? A. It is way down below Craney Island.

Q. How far below? A. I couldn't say exactly; I suppose it is—

Q. Do you know the width of the channel? A. 400 or 500 yards. It is wider in some places than in others.

Q. Ranging from 400 to 500? A. No, it gets less than that.

Q. Whereabouts? A. Craney Island.

Q. What do you put the width of the channel between Craney Island and Lambert's Point? A. I don't know.

Q. Within about what range? A. From 250 to 450 yards.

Q. And to your recollection. is the channel straight or crooked? A. No, sir; it is not very straight—it isn't very crooked, either.

Q. Do you know what the course of it is? A. Not ex-
(99) actly—not by compass. I know it is something like south by west where the collision occurred, and then turns a little more to the south, but I couldn't repeat the courses.

Q. Do you know it between buoy number 7 and 9? A. Yes, I suppose the course there would be somewhere about south; I couldn't say to a quarter of a point.

Q. In your diagram, what have you shown as the heading of your steamer? A. About south south east.

Q. When you first saw the Plymothian you estimated her distance from you at what? A. When I first saw her she would be inside of half a mile from us.

Q. You had not seen her prior to the time that the Victory blew the two blasts? A. Yes, sir; the second two blasts.

Q. You did not observe her? A. My attention was drawn to her then by the whistles being repeated twice.

Q. You didn't notice her on the occasion of the first whistle? A. No, sir.

Q. You have stated that the first schooner was then abeam of you? A. The first schooner?

Q. Yes? A. When the second two blasts were blown?
(100) Q. Yes, sir. A. About that I couldn't swear, but I think, as far as my memory serves me, that schooner was about our beam.

Q. And you were then to the east of the centre line of the channel? A. Yes, sir.

Q. And you passed within about 30 yards of this schooner? A. Yes, sir; somewhere about that. I know we passed a little closer to the second than the first.

Q. You passed the second schooner about 20 yards? A. Yes, sir; a little closer than we were to the first schooner.

Q. (By Mr. HUGHES): I understand both the schooners were going down the river? A. Yes, sir.

Q. (By Mr. MYNDERSE): Did the Victory blow a signal of three blasts? A. Yes, sir; certainly she did.

Q. You remember hearing those? A. Yes, sir; I remember hearing those very distinctly.

Q. You are sure of that as you are of anything? A. I am as sure of that as I am that I am living.

Q. And after about a minute that second whistle— A. About that I couldn't swear to; it was shortly after.

Q. You did swear it was a minute after. Do you want to change that? A. No, sir; it was shortly after.

(101) Q. You have sworn it was a minute. Do you wish to change it? A. No, sir; I will let it stand at that.

Q. And that is as good an estimate of the time as you can make? A. Yes, sir.

Q. And the time that vessel was reversing you say was 4 or 5 minutes? A. Yes, sir.

Q. And that is as good an estimate as you can make? A. Yes, sir.

Q. You had no better opportunity of measuring one time than the other? A. No, sir.

Q. It was not a question of a watch or clock or anything? A. No, sir.

Q. It is an estimate of recollection purely? A. Yes, sir.

Q. You think then the two schooners were too close together for you to go between them? A. Yes, sir, I do.

Q. You have stated in Mr. Hughes' examination that the second schooner was 300 feet astern of the first? A. Yes, sir.

Q. That is your best estimate? A. Yes, sir; as near as I could judge it,

Q. Don't you think that there was room to go between? A. No, sir.

(102) Q. You are of opinion there was not room to go between? A. I am of the opinion it would not be safe to put our ship between under the circumstances.

Q. It would not have been safe then in 300 feet? A. That depends on circumstances; we have got a flood tide with us and it makes it a little too risky with a schooner moving down. Under the circumstances, I would not if I had been in command of the ship, have attempted to do it.

Q. You don't think it was space enough—300 feet? A. It was space enough, but I don't think it was prudent for our ship to go between.

Q. Don't you think you are estimating that space rather short? A. No, sir.

Q. You think 300 feet a fair estimate? A. It's a ship's length; of course it's an estimate, that is all.

Q. All your measurements are estimated, I believe? A. All estimated.

Q. The Plymothian you did not see, as I understand now, until after the Victory gave her second signal of two blasts? A. Yes, sir.

Q. And you have estimated her bearing at 3½ points on

your starboard bow, and her distance inside of half a mile? A. Yes, sir, somewhere about that. That is in a direct line; about half a mile, I suppose.

(103) Q. And 3½ points on your bow. Was he heading across your course at that time? A. She was slightly across the channel.

Q. So you could see her port bow? A. I could see her starboard bow. I could see the stem of the ship, but she was then going a little across our course under the influence of her port helm.

Q. So her course was ahead of yours a little, then, and if you had been at anchor she would have gone ahead of you? A. No, sir. Supposing our course to be south, her course would be about northeast; she was crossing our course a little.

Q. But her course was at an angle to your course? A. Yes, sir, and under port helm. I then heard the captain say to the pilot "that ship had ported her helm."

Q. Was her heading at the time you first saw her such that your vessel would have been in danger if she had been anchored? A. No, sir, certainly not; she would have passed to the west of us.

Q. You heard your captain say she was porting; when did you hear him say that? A. Just before he blew the second whistle.

Q. Just before you saw her? A. Yes, sir, I heard him say that. I was on the lower bridge.

Q. And then she blew two whistles? A. Yes, sir, and the pilot said, "we cannot port, I will have to go astern," (104) and ran to the telegraph. About a minute after a signal of three blasts were blown.

Q. What were you doing when passing Craney Island? A. I was on the lower bridge superintending the men getting ropes ready for going alongside the wharf.

Q. How far were you from the upper bridge? A. I was immediately under it.

Q. So you could hear the whistle? A. I could hear the whistle and everything that passed, I suppose, that was spoken in an ordinary tone of voice.

Q. When did you see that the change was made from a speed of 10 knots on the Victory? A. Just before we got to Craney Island.

Q. What do you know about that change? A. About what change?

Q. That change of speed? A. I heard the telegraph ring. We have a telegraph on both bridges, and I could see, being on the lower bridge, the lower dial, and I could feel by the ship's shaking that she had eased her speed.

Q. How many changes are there on your dial? A. There is slow, half speed, full speed, stand by, and stop on each side—slow, half speed, full speed, stand by—that is, four on each side, and "stop" makes 9.

Q. That is, full speed, stand by, half speed, and slow on each side—one for going ahead and one for reversing? A. Exactly.

(105) Q. And then "stop" in the centre? A. Yes, sir; the way the handle is shoved indicates the direction she goes. Full speed ahead is forward and reverse it back is full speed astern.

Q. Where is this dial you say you saw? A. On the lower bridge just near the wheel-house door.

Q. Alongside the wheel-house door? A. Not alongside the wheel-house door.

Q. Do you know why you were put to "slow?" A. I suppose we were going towards narrow waters and there is shipping around there, and we did not want to go too fast. I don't know what the Captain's reason was; that was my idea.

RE-EXAMINATION.

By Mr. SHARP:

Q. You have stated that the first schooner that the Victory met after passing Craney Island was a-beam of the Victory at the time you heard the first whistles from the Victory? A. Yes, sir; she was about that, as far as my memory serves me.

Q. How far had she proceeded down the stream at the time of the collision? A. The schooner?

Q. Yes, sir, the first schooner; how far had she proceeded down the stream at the time of the collision? A. I didn't notice her.

(106) Q. About? A. I can't tell; I didn't see her. I might calculate how far I thought she might go.

Q. At the time of the collision did you see the second schooner? A. At the time of the collision the second schooner was about abeam of us.

Q. Bearing what way? A. Right abeam of us, going down channel.

Q. And how far off was she on an east and west line at that time? A. She was a little outside of us; about 20 or 30 yards outside of us.

Q. And how far off do you think the other schooner was at that time? A. I couldn't say exactly.

Q. Make an estimate. How far do you suppose the second schooner was off at that time? A. The second schooner?

Q. The first schooner; how far off was the first schooner at the time of the collision, in your judgment? A. I suppose she would be a ship's length or so astern; I didn't look—I don't know.

Q. At the time of the collision, then, the second schooner was a-beam of the Victory, and the first schooner had proceeded down the river a ship's length, perhaps, from the Victory, in your judgment? A. Yes, sir; I suppose so, but I didn't see the schooner. I was looking at the Plymo-
(107) thian over the bows.

Q. And did you see the second schooner at the time of the collision? A. Yes, sir; saw the second schooner.

Q. And are you positive she was a-beam of the Victory? A. She was thereabouts.

Q. And how many yards off? A. About 20 or 30 I should judge.

Q. At the time that the engines of the Victory were reversed, which schooner off there would have prevented the Victory from successfully porting her helm without collision; the first schooner? A. The first schooner, I should say. We would have had to go between the two schooners; that was the only way out.

Q. And that would not have been good seamanship, in your judgment? A. As far as my judgment goes, that would not have been practicable. It was not prudent, at any rate.

Q. After that, what prevented the Victory from porting? A. The second schooner.

Q. After that, did anything prevent the Victory's porting? A. She would have made the blow worse to the Plymothian.

Q. Then, when the second schooner was approaching the Victory, if the Victory had then ported, she would have run into the Plymothian? A. Yes, sir, exactly; that is, if we had put the engines ahead and ported. Of course, as she
(108) was stationary, it did not make much difference.

Q. Does the helm have any great effect upon a large steamer when backing? A. It does not have much effect; it does help the engines, but not to any great extent, like going ahead.

Q. Does it help in slewing or canting? A. A little.

Q. Anything more than that? A. I don't understand you.

Q. Does it help in any other way than in slewing or canting? A. No, sir, I can't say it does.

Q. Then you say the Victory, from the time she began to reverse her engines until the collision occurred, could not have ported her helm without colliding with one of

those two schooners or the Plymothian? A. No, sir; that is exactly it. I don't think it was prudent to do it, or practicable.

By Mr. MYNDERSE:

Q. What kind of a screw have you? A. A right-handed screw.

Q. That is, when you are going ahead, the top of the screw turns which way? A. Right-handed.

Q. From port to starboard? A. Yes, sir.

Q. When you are going ahead the top of the screw turns from port to starboard? A. Yes, sir. When we are going astern it slews our stern to port and head to starboard.

Q. You were very much down by the stern at this time? (109) A. Yes, sir.

Q. What effect does such trim have on your steering; does she answer her helm quicker or slower when down so much by the stern? A. I should say she answered better when down by the stern; she has got more rudder in the water.

By Mr. SHARP:

Q. You have spoken of one of the plates being driven clear through the Victory's bow; was that a plate from the Victory or from the Plymothian? A. From the Plymothian, out of the after-part of the hole that was made in the Plymothian.

Q. You have stated that the Plymothian struck the stem—the sharp stem of the Victory? A. Yes, sir, she went on by the stem.

Q. She didn't strike the flat side? A. She didn't strike the flat side.

Q. What is the effect of a flood tide upon a steamer that was in the condition that the Victory was in at the time her engines were being reversed; how did it cause her to cant? A. Canted her head to port; she was deeper aft than she was forward.

Q. And after that you starboarded the helm. A. After (110) that the helm was starboarded.

Q. To correct that? A. To correct that, as soon as she lost her headway.

By Mr. FLOYD HUGHES:

Q. Mr. Chandlish, just give the draft of your vessel. A. Well, when she is down to Indian-summer mark she is 23 feet.

Q. How much ballast does she take in? A. Well, on

this particular voyage we had about 400 tons of water ballast.

By Mr. SHARP:

Q. How many tons of coal did she have? A. She had about 550 tons of bunker coals on board.

Q. I will ask you one more question about this accident. Was there a hollow space between the starboard and port bows of the Victory at the place of the accident where she was stove in, or was there any oak or iron? A. It was hollow.

Q. There was no oak or iron except the sides? A. No, sir, except the frames and plates; there was nothing internally—that's what you mean, isn't it?

By Mr. MYNDERSE:

Q. How far back on the port side on the stem did the wound extend? A. About three feet, or maybe a little more.

Q. About the same as the starboard side? A. About the
(111) same—about the same sized patch.

By Mr. SHARP:

Q. Do you know how long it took to repair that hole? A. It took ten days.

Q. How many men were working on her? A. I couldn't say only the ones that were working aboard the ship—I know there were about a dozen men.

Q. It took you about ten days? A. Yes, sir.

HENRY S. GILBERT, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP:

Q. What is your name, age and occupation? A. Henry S. Gilbert, 28, Third Mate.

Q. Of what? A. The Victory.

Q. The British steamship Victory? A. Yes, sir.

Q. How long have you been following the sea? A. 13 years, sir.

Q. How long have you been an officer of a ship? A. Nearly four months.

Q. How long have you served on the Victory? A. Nearly
(112) four months.

Q. What is your home? A. In Bucks.

Q. Referring to the 12th day of November, 1891, when there was a collision between the British Steamship Victory and the Plymothian, somewhere between Lambert's Point

and Craney Island, where were you at and for an hour or so previous to the collision? A. At the wheel, sir.

Q. Wheel of what? A. The Victory.

Q. You were the helmsman? A. Yes, sir.

Q. All the way during that trip? A. All the way from the time we hove anchor.

Q. Now say where you hove anchor? A. In Hampton Roads.

Q. Were you the helmsman up to Craney Island from lifting anchor? A. Yes, sir.

Q. In the matter of speed, how was the Victory proceeding from Hampton Roads to Craney Island? A. Full speed ahead, sir.

Q. Did she reduce her speed, if so, at what place? A. Just as we reached Craney Island.

Q. Did you slow down much at that point? A. Yes, sir, half speed.

(113) Q. Did she increase her speed at any time from Craney Island up to the collision after it was once reduced? A. No, sir.

Q. In approaching Craney Island did you see any steamers, if so, describe them? A. Two paddle boats.

Q. You saw two paddle boats? A. Yes, sir.

Q. On which side? A. Starboard side, sir.

Q. Did each of them whistle to the Victory? A. Yes, sir.

Q. How many— A. Two each, sir.

Q. What reply did the Victory make? A. The same, sir.

Q. Before passing the two river boats do you recollect meeting an English steamer going out? A. I don't remember it, sir.

Q. Now as to those two river boats each of which gave two whistles to the Victory and the Victory replied with two whistles? A. Yes, sir.

Q. Now after passing Craney Island did you meet any other steamer, if so, where? A. Just after we passed the light-house we passed another paddle boat.

(114) Q. On which side was she? A. Starboard.

Q. Did she whistle? A. Yes, sir.

Q. How many? A. Two.

Q. What did the Victory do? A. Repeated them.

Q. On which side of the Victory did those three river steamers move? A. On the starboard side, sir.

Q. On which side of the channel did the Victory move? A. East side, sir.

Q. On which side of the channel did those three steamers move? A. On the west side, sir.

Q. Could the Victory have safely gotten upon the western side of the channel— A. No, sir.

Q. Wait a minute—when meeting those steamers? A. No, sir.

Q. Why did she go over to the eastern side? A. She was forced to by those other vessels blowing their whistles.

Q. Which indicated what? A. That they were going down on the western side.

Q. They took position, then, on the western side of the channel? A. Yes, sir.

(115) Q. And moved down the channel? A. Yes, sir.

Q. Did you see them move down? A. Yes, sir.

Q. Were there any vessels in front of them to obstruct their movement down the western side of the channel? A. Not when they passed us.

Q. They had clear way? A. Yes, sir.

Q. The Victory, then, took the eastern side of the channel, forced to do so, as you say, by those three river steamers taking the western side? A. Yes, sir.

Q. How near to the eastern line of the main ship channel did the Victory keep in passing from Craney Island to the scene of the collision—how near to the eastern line of the channel did she move? A. About 40 yards, as near as I could tell.

Q. About 40 yards? A. Yes, sir; about 40 yards.

Q. After meeting the three steamers, did you see any other vessels in the channel coming down; if so, what? A. Yes, sir; saw two schooners.

Q. How far apart were they? A. I don't know how far they were apart.

Q. Do you think they were 100 yards apart, or more or less? A. I don't know how far they were apart.

(116) Q. Were they right close together, or some distance apart? A. They were not close together.

Q. With reference to the movement of the helm of the Victory, how was it generally kept between Craney Island and the point of the collision? A. Steadied, sir.

Q. In which way, hard to port or starboard, or what? A. Amid-ships.

Q. Her helm was amid-ships then? A. Yes, sir.

Q. Coming up the channel? A. Yes, sir.

Q. On the eastern side? A. Yes, sir.

Q. And close to the bank? A. Yes, sir.

Q. You say about 40 or 50 yards from the bank. A. Yes, sir.

Q. Did you see buoy number 7 at any time—the black buoy on the left hand side? A. Yes, sir.

Q. How near to that buoy did the collision occur? A. *Right just to the north of it, sir.*

Q. Just to the north? A. Yes, sir.

Q. At the time of the collision, how far from the eastern line of the channel was the Victory? A. We were closer (117) to the eastern line of the channel.

Q. Than you had been? A. Yes, sir.

Q. What caused that? A. By starboarding to avoid those two schooners and then steadying again.

Q. The Victory then starboarded to clear those schooners? A. Yes, sir.

Q. And that placed her a little nearer? A. Yes, sir.

Q. Well, how many yards from the eastern line of the channel was the Victory at the time of the collision? She had been 40 yards? A. It was due north of number 7 buoy.

Q. Can you tell how much nearer she was in yards to the channel line? A. No, sir.

Q. She was nearer? A. Yes, sir.

Q. But you couldn't tell how much nearer? A. No, sir:

Q. And that was caused by her starboarding a little to clear those two schooners, although she afterwards steadied? A. Yes, sir.

Q. Did you see the Plymothian; if so, where was she when you first saw her? A. Just after we passed the last steamer.

(118) Q. Where was she at that time? A. She was about three quarters of a mile from us.

Q. Well, where was she? At what point? A. Off Lambert's Point, sir; a little to the north of it.

Q. On which side of the channel? A. On the western side.

Q. On the western side of the channel? A. Yes, sir.

Q. When you first saw her, how was she moving in respect to the channel? A. Moving down the channel.

Q. On which side? A. Western side.

Q. She was over on the western side when you first saw her? A. Yes, sir.

Q. Below Lambert's Point? A. Yes, sir.

Q. And she moved down the channel on the western side? A. Yes, sir.

Q. Now tell how she moved; describe the movement? A. I saw her heading right down channel, sir, and as we came closer—went further up the river—she altered her course right straight across to the eastern shore.

Q. Did she keep on that course? A. Yes, sir.

Q. When she began to alter her course, what was done on the Victory, or just before she altered her course what (119) was done on board the Victory? A. Yes, sir.

Q. What was done? A. We blew two whistles and then repeated them.

Q. And that was just before she altered her course, or at the time. Were those whistles blown about the time she altered her course, or when? A. I think one was blown before she altered her course, and one just as she began to turn.

Q. You mean the first of the whistles? A. Yes, sir.

Q. Was there much time elapsed between the Victory sounding her two first blasts and sounding the second two? A. No, not much time.

Q. A short time? A. Yes, sir.

Q. Did the Plymothian reply to either of those whistles from the Victory as far as you could see; if so tell what you saw and heard? A. After we blew our first two I looked at him and I saw some steam coming out of his pipe, but heard no whistles.

Q. That was after you blew your first whistle? A. Yes, sir.

Q. Did you look at the Plymothian after you blew the second two to see whether steam came from the pipe? A. Only once I saw steam coming out.

Q. I understand you did not see, but did you look to see (120) if there was any steam or any sound? A. Yes, I was looking at her and didn't see any.

Q. It was between the two signals of two whistles each that you saw steam coming from the pipe, but heard no sound? A. Yes, sir.

Q. Was anything done on the Victory to prevent the collision; if so, state what it was? A. Yes, sir; the pilot told the captain to stop her and go full speed astern.

Q. Was that done? A. Yes, sir.

Q. You know it? A. Yes, sir.

Q. How long were her engines reversed; for what period of time? A. At leasf four minutes, sir.

Q. For at least four minutes? A. Yes, sir.

Q. At the time the engines were reversed, how far from buoy number 7, that black buoy on the eastern side of the channel, was the Victory? A. About three of our ship's lengths.

Q. About three lengths of the ship? A. Yes, sir.

Q. And the collision occurred near buoy number 7? A. Right at buoy number 7.

Q. During the time that the Victory was passing those (121) three lengths up to the scene of the collision, what were her engines doing? A. Full speed astern, sir.

Q. How was the Victory heading at the time of the collision? A. I don't know what she was heading by the com-

pass, sir; but she was heading right for the light-house on the end of Lambert's Point pier.

Q. How was her helm at the time of the collision? A. Hard-a-starboard.

Q. Why was it put hard a-starboard? A. To help swing her head to starboard with the engines going full speed astern.

Q. When a ship is moving ahead and her helm is ported, even if her engines are reversed, in which way will her head cant? A. To starboard, sir.

Q. When the ship is actually moving backward, bodily moving backward, how must the helm be put to make her cant to starboard? A. Hard-a-starboard.

Q. Was it put hard-a-starboard? A. Yes, sir.

Q. At what time? A. Shortly after the engines were put astern.

Q. Was the Victory at any time before the collision actually moving backward? Could you tell where you were? A. I think she was moving astern.

(122) Q. For what reason? A. Because I could see the back wash of the propeller on the forward side of the bridge.

Q. What did that indicate to your mind? A. She was going astern, sir.

Q. And when going astern ought her helm to be put to starboard to make her cant to starboard? A. Yes, sir.

Q. Was that done? A. Yes, sir.

Q. For that purpose? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. And when a ship is moving ahead, even if her engines are reversed, her helm must be ported to make her cant to starboard? A. Yes, sir.

Q. You say that you saw the Plymothan after passing Craney Island and after passing the third steamer? A. Yes, sir.

Q. You had gotten past the third steamer before you saw the Plymothian? A. Yes, sir.

Q. She was then on the western side of the river? A. Yes sir.

Q. And moving down the channel on the western side? A. Yes, sir.

(123) Q. And was then about three-quarters of a mile off, in your judgment? A. Yes, sir.

Q. And when the Victory was about three ship's lengths of buoy number 7 she gave two whistles to the Plymothian? A. Before that, sir.

Q. You say she reversed her engines when she was about three ship's lengths north of buoy number 7? A. Yes, sir.

Q. And previous to that time she had given two whistles to the Plymothian? A. Twice given them.

Q. And received no signal of any kind in reply? A. Not that I heard.

Q. But you saw steam coming from her pipe in the interval between the sounding of the two sets of whistles from the Victory? A. Yes, sir.

Q. When the Victory reversed her engines, what else could she have done to have helped to prevent a collision with the Plymothian—what else could she have done besides backing that would have tended to prevent a collision? A. Nothing.

Q. Suppose she had starboarded at that time, what would have happened? A. Run ashore.

Q. Suppose she had ported? A. Run over the top of the (124) schooner.

Q. Where was the schooner? A. Close on our starboard bow.

Q. At the time of the collision where was that schooner? You say you saw two schooners? A. Three altogether.

Q. Saw three altogether? A. Yes, sir.

Q. Where were the two hindmost schooners. Now, take the hindmost schooner going down, where was she at the time of the collision in the matter of bearing from the Victory? A. On our starboard bow.

Q. Where was the second one of those schooners at the time the whistles were blown from the Victory? A. I think she was right abreast of us.

Q. How far off were those schooners on an east and west line from the Victory—I mean across the channel; I don't mean in length, but how far to the westward were those two schooners—speak first as to one and then as to the other—from the Victory. I don't mean how far they were down or up, but across the channel, suppose they were abeam, how far was each of those schooners from the Victory? A. As near as I could guess it would be about 100 feet, sir.

Q. Would it have been safe for the Victory to have ported her helm and have attempted to run between those schooner? A. No, sir.

(125) Q. There was nothing then that the Victory could have done, except to reverse her engines? A. No, sir.

Q. And she did reverse them? A. Yes, sir.

Q. At what speed did she reverse them? A. Full speed astern.

Q. How long was that kept up? I think you said 4 or 5 minutes? A. At least 4 minutes.

Q. How was the tide? A. Flood tide.

Q. In the situation the Victory was on the eastern side of

that channel and near the bank, and having slightly starboarded her helm to clear the schooner you have just spoken of, what effect did the tide have upon the movement of the Victory in the matter of making her cant? A. Made her cant to port.

Q. Made her cant to port? A. Yes, sir.

Q. That is, towards the land? A. Towards the eastern shore; yes, sir.

Q. Then, it was the flood tide as well as clearing the two schooners that caused the Victory to head somewhat towards the east as she was approaching buoy number 7? A. Yes, sir.

Q. And you say that to correct that it was necessary after (126) the ship was moving backwards to put her helm to starboard, and hard to starboard? A. Hard-a-starboard; yes, sir.

Q. At any time from Craney Island up to the scene of the collision did the Victory move in the middle of the channel and away from the eastern line? No, sir.

Q. She was all the time on the eastern side of that channel? A. Yes, sir, the whole time.

Q. Was she all the time near the eastern line of that channel? A. Yes, sir.

Q. Which was she nearer to, the eastern line of the channel or the middle line of the channel? A. The eastern line.

Q. And she was forced over to the eastern line by the three steamers that were going down on the western side? A. Yes, sir.

Q. How near were those steamers; were they on the west of the channel—of the middle line of the channel? A. A little on the west of the line.

Q. And were those schooners between the steamers and the eastern line of the channel? A. No, sir, they were aft of the steamers.

Q. That is up and down the river? A. Yes, sir.

Q. But the steamers being in the western part, and west of the middle line of the channel. You have stated that (127) the schooners were in the eastern part and east of the middle line of the channel—the steamers you have stated were west of the middle line of the channel, and the schooners near the Victory? A. Yes, sir.

Q. And were they between the middle line of the channel and the Victory? A. I couldn't say that, sir.

Q. And they were near the Victory? A. Yes, sir.

Q. About 100 feet off? A. Yes, sir.

Q. And she was about 40 feet from the bank? A. Yes, sir.

Q. Could you see the schooners after they passed you for any length of time? A. No, sir.

Q. Why not? A. Because I never looked behind me, sir.

Q. Why didn't you look? A. Because I was engaged in steering and looking at this other vessel.

Q. Which other vessel? A. The Plymothian.

Q. You did not look behind, you were steering and looking at the Plymothian? A. Yes, sir.

(128) Q. How were the officers stationed on the ship? You were stationed where? A. At the wheel.

Q. Who was on the lookout? A. The captain.

Q. What officers were on the bridge? A. The captain, pilot and myself.

Q. Where was the second officer stationed? A. Aft.

Q. Did you hear any danger signals or any other signals from the Plymothian? A. No, sir.

Q. Did you hear, previous to the sounding of the whistles on the Victory, any signal or whistles as if coming from the neighborhood of Lambert's Point? A. No, sir; none.

Q. Not from any vessel? A. No, sir; only those three steamers.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. Everything was a dead calm, then, up towards Lambert's Point pier, was it? A. The wind, sir?

Q. Everything in the shape of sound was absent towards Lambert's Point? A. I heard no other sound, only those three boats—paddle boats.

(129) Q. Where did you pass the first boat? A. Below Craney Island.

Q. How far below? A. I couldn't say, sir.

Q. Was it a mile, two miles, or half a mile, or what? A. Within half a mile.

Q. Where did you pass the second boat? A. Below Craney Island.

Q. How far below? A. Well, it was between the first boat and Craney Island.

Q. About half way between? A. Between the first boat and Craney Island.

Q. Half way between? A. Half way between one and the other.

Q. You passed her, then, before you slowed down? A. Those two; yes, sir.

Q. How long before you slowed down did you pass the second one? A. A few minutes.

Q. What do you call a few—four or five, or two or three—about how many? A. About three minutes.

Q. You were then proceeding at about how many knots an hour? A. We were going full speed ahead up to the time we passed Craney Island.

Q. What were you making with the flood tide? A. I don't know how fast the flood tide travels.

(130) Q. How fast does your vessel travel through the water at full speed? A. About 9 knots.

Q. Where was your boat with reference to Craney Island Light when you passed the third steamer? A. We had just passed Craney Island.

Q. And had you slowed down, or was that before you slowed down? A. We had slowed down, sir.

Q. How long before? A. When we were just passing Craney Island.

Q. And almost immediately you passed this third steamer? A. Yes, sir.

Q. How far did she pass from you? A. I couldn't say how far she passed. I was attending to the wheel, and we had to steady the wheel after we starboaded to get by her.

Q. You had to starboard to get by her? A. Yes, sir.

Q. And you steadied the wheel as you passed her? A. Yes, sir.

Q. How many schooners did you pass after you passed that third steamer? A. Passed two, and the third one was at the scene of the collision.

Q. How far was that first schooner behind the steamer when you passed her? A. I couldn't say, because I didn't (131) look behind to see where the steamer was when she once passed us.

Q. You were looking ahead, then, when she passed you? A. I looked at her as she went by.

Q. You then looked ahead; couldn't you see the schooner? A. He was on our starboard side.

Q. How far away? A. I don't know what rate those paddle boats travel, and I couldn't tell how far this other schooner was.

Q. You saw the schooner? A. Yes, sir.

Q. And you could form no judgment of how far she was from the steamer? A. No, sir.

Q. She was a considerable distance, was she not? A. I couldn't say.

Q. You couldn't say whether she was close aboard or a mile away? A. I couldn't say whether she was close to this other one or not.

Q. I am speaking of this schooner with reference to this steamer; and when you passed the schooner you could form no idea of how far she was from her? A. Yes, sir.

Q. How far do you think she was from this other schooner? A. I couldn't say. I was steering and listening to hear if the pilot had any other orders to give me.

Q. You did see her as you passed the first schooner, (132) though? A. Yes, sir.

Q. Was she then on your starboard bow? A. Yes, sir.

Q. You cannot tell whether she was 100 feet or half a mile off? A. From the other ones?

Q. Yes, sir? A. No, I couldn't tell that.

Q. How far did you pass that second schooner? A. How far were we from her?

Q. Yes? A. As near as I could tell, 100 feet, sir.

Q. About 100 feet? A. Yes, sir, both of them.

Q. Was she to the east or west of the middle line of the channel? A. I don't exactly know the mid-channel, which is mid-channel, sir. She was nearer the middle of the channel; I could tell the buoys on either side.

Q. You could tell from the buoys on either side? A. Yes, sir.

Q. What buoys did you see along there? A. I saw number 7 buoy on the port side, and I saw the red buoy on the starboard side.

Q. How far off did this red buoy seem to be? A. Some distance from where the schooner was, on the other side.

(133) Q. In a line with the schooners as you passed it? How did those buoys bear with reference to your vessel when you passed the schooner? A. I couldn't say that, sir, how they bore.

Q. Were they in a line with the schooner off your beam to the west? A. No, sir; I don't think we were passing any buoys right abreast at the time those schooners passed.

Q. You say you judged the middle of the channel by the buoys, and I want to get what buoys you saw. You say you saw number 7 buoy on your port side; what did you see on the starboard side? A. I don't know the number; I saw a buoy.

Q. I didn't ask the number. A. I saw a red buoy, sir.

Q. Where was it with reference to a line directly across from your vessel and the schooner; abeam to the west of your vessel? A. When I noticed it the schooner had passed by the buoy, and the buoy was bearing about three points on her starboard bow.

Q. The buoy was bearing three points on your starboard bow when you passed the schooner? A. Yes, sir.

Q. How far did that buoy appear to be off? A. I couldn't say, sir; I don't know the width of that channel.

(134) Q. How far did the schooner pass from that red buoy? A. I don't know what distance he was from it, sir.

Q. You don't know the distance the schooner passed from the red buoy? A. No, sir.

Q. If you don't know the distance the schooner passed from the red buoy, how can you tell whether she was in the middle of the channel, east of the channel or west of the channel? A. By looking from the buoy I saw on the starboard bow to the one on the port bow.

Q. That is exactly what I am asking. How far was the schooner from the buoy on your starboard bow? A. She appeared to be about midway of the channel.

Q. How far from the red buoy on your starboard bow? A. Mid-channel.

Q. Do I understand she was about the same distance from the red buoy as the black buoy? A. Yes, sir.

Q. And then that was the way you judged she was about mid-channel? A. Yes, sir.

Q. And you were on the eastern side of that channel? A. Yes, sir.

Q. How far was the third schooner you have mentioned from the second schooner? A. I couldn't say, sir.

(135) Q. You are certain that there was a third schooner? A. Yes, sir, third one at the scene of the collision.

Q. And if any other person has testified there were only two schooners, he was mistaken and you are not? A. I don't know what he saw. I know what I saw.

Q. And you saw three schooners? A. Yes, sir

Q. Describe those schooners? A. They were fore and aft schooners.

Q. Schooners are usually fore and aft are they not? A. Not all of them, sir, some of them have top-sails; the others were two-masters, but whether the first was or not I couldn't say.

Q. Were they large or small vessels? A. They want large ones, and want very small ones, sir.

Q. Ordinary sized schooners? A. Yes, sir, ordinary schooners.

Q. Yow long after you passed the second schooner was it before your engines were reversed? A. I conldn't say to that, sir. I was watching the steering, sir, and then I looked up and saw the Plymothian.

Q. The Plymothian was near you when your engines were reversed, then? A. Yes, sir.

Q. Were you opposite the third steamer, the first schooner, second schooner or third schooner when you sounded your first signal of two whistles? A. Opposite the

(136) first schooner, I believe, sir, when we sounded the first two whistles.

Q. And opposite what vessel, if any, when you sounded

the second? A. The second schooner when we sounded the second whistles.

Q And you were opposite the third when you sounded your three blasts, I suppose? A. I don't know whether we were opposite the third when we sounded the three; it was before we passed the third one—it was before the third one got up when we blew our three whistles.

Q. You have stated that the collision took place north of buoy number 7, I understand? A. Yes, sir.

Q. Are you acquainted with the channel of the Elizabeth river, and how many trips have you made? A. I was here once before, sir, and steered the vessel up.

Q. You know the channel more by the buoys than you do by your own knowledge then? A. Yes, sir.

Q. You have stated that you saw steam coming from the Plymothian's whistle after you blew your first set of signals? A. Yes, sir.

Q. That you observed the whistle at the time of the collision and saw no steam coming from it and heard no whistle? A. I heard no whistle, sir

Q. You are positive then, that no signals were sounded? (137) A. Not to my knowledge.

Q, And you were looking steadily at her? A. Yes, sir.

Q. Then the only signal that she gave to your vessel, if that was a signal, was after your first signal? A. Yes, sir.

Q. And nothing further was done? A. Not in the way of whistles from her, no, sir.

Q. Up to the time of the collision? A. Up to the time of the collision, yes, sir.

Q. How far were you from buoy number 7 when you sounded your second blasts? A. About three times the length of our ship, sir, after we blew our second blast.

Q. What interval of time was there between your first and second blasts—I mean your second set of blasts? A. Half a minute as near as I can say, it may be more and it may be less.

Q. And you are positive your engines were going full speed astern for four minutes before the collision? A. Yes, sir.

Q. You say you couldn't judge the distance between the first two schooners you passed? A. No, sir.

Q. But you did state in your direct examination that they were not close together? A. No, sir, they were not close together.

(138) Q. They were both about the same position relatively to the middle of the channel, were they not? A. Yes, sir.

Q. And you passed them about the same distance off—both of them? A. Yes, sir.

Q. You were making about the same speed in passing both? A. Yes, sir, half speed.

Q. You cannot judge of the distance of the third schooner from the second? A. No, sir.

Q. You are positive you were opposite the second schooner when you sounded your second signal; when you sounded your second blasts of your whistle? A. Yes, sir.

Q. How long was it after you sounded your second blast before your engines were reversed? A. Almost immediately afterwards.

Q. And your engines continued reversed for at least four minutes at full speed? A. Yes, sir.

Q. Before the collision? A. Yes, sir.

Q. That is your deliberate and positive statement, is it? A. Yes, sir; full speed astern.

Q. And that you were opposite the second schooner when you blew your second blasts? A. Yes, sir.

(139) Q. And you could not be mistaken; that is your positive recollection? A. That is only as I can remember, sir.

Q. And that is as true as anything you have stated in this examination, is it? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. The Victory had always been on the eastern side of the channel? A. Yes, sir.

Q. From the time she first entered the channel she was on the eastern side? A. From the time we passed the first steamboat, sir; we were forced on the eastern side.

Q. Where were you when you passed the first boat? A. Below Crarey Island.

Q. Had you entered the channel at that time? A. Yes, sir, we had entered the channel.

Q. Where were you when the first steamer blew to you? A. Mid-channel.

Q. How was the other steamer? A Very nearly ahead of us.

Q. Coming down? A. Yes, sir.

Q. Head and head? A. Very near it.

(140) Q. Why didn't you whistle to port? A. Because he blew his two whistles first.

Q What is the rule of the road—that both shall port? A. That is the rule in England.

Q. Aint it the rule all over the world? Your steamer assented to the whistles the other steamer gave. A. Yes, sir.

Q. And then you continued on the eastern side of the channel? A. Yes, sir.

Q. What kind of a steamer was that? A. A paddle boat.

Q. Were all the steamers paddle boats? A. I don't know about the others; I know the first one was a paddle boat.

Q. Do you know the name of any of those steamers? A. The "Accomac" was one of the names.

Q. Which was she? A. I don't remember whether she was the first, second or third, sir.

Q. At that time your steamer was going full speed? A. Passing the first and second, yes, sir.

Q. Then when you reached Craney Island her speed was reduced to half speed? A. Yes, sir.

Q. Was that the order on the dial—half speed? A. Yes, sir.

(141) Q. You saw that yourself? A. I saw it myself.

Q. You are confident it was reduced to half speed? A. Yes, sir.

Q. What are the orders on the dial? A. Full speed ahead, half speed, stop—

Q. Is there any "slow"? A. Ahead on the forward side and on the after side it is the same.

Q. Astern "full speed," "half speed," and "stop" A. Yes, sir.

Q. And forward is "full speed," "half speed," and "stop"? A. Yes, sir, same on the forward and aft.

Q. Is there an order to "stand by"? A. Yes, sir, I believe there is.

Q. On each side? A. Yes, sir—no, I couldn't say whether it was on each side; there is an order for "stand-by."

Q. Was not this order given at Craney Island, to "stand-by"? A. No, sir.

Q. You say it was "half speed"? A. Stopped her, full speed astern.

Q. That is at the time of collision. I mean at Craney Island. When you say you reduced the speed of the steamer, was not the order "stand by"? A. No, sir; stop, full speed astern.

Q. That was after the whistles were exchanged? A. No, sir—before.

(142) Q. I want to be sure we are talking about the same thing. You say the speed of your steamer was reduced when you got to Craney Island? A. Yes, sir.

Q. You had been running full speed up to that time? A. Yes, sir.

Q. Was there any order thereafter given to your engines before the order was given to reverse after you had whistled to the Plymothian? A. Yes, sir; an order was given before that, sir.

Q. They were? A. Yes, sir.

Q. What were they? A. half speed.

Q. You saw the order? A. Yes, sir.

Q. It was not "stand by"? A. No, sir.

Q. You saw it yourself? A. Yes, sir.

Q. On the dial? A. Yes, sir.

Q. That would transmit the order to the engine room for half speed? A. Yes, sir.

Q. No mistake about that? A. No, sir.

(143) Q. That was the order? A. Abreast of Craney Island.

Q. Abreast of Craney Island the order was for half speed? A. Yes, sir.

Q. And was that order which was given abreast of Craney Island for half speed the only order given to the engines up to the time the order was given to stop and reverse? A. The only order.

Q. And this order to stop and reverse was given after you whistled to the Plymothian? A. Yes, sir; the second time; after we whistled twice, two sets.

Q. How much above Craney Island were you when you first saw the Plymothian? A. To the south or north, sir?

Q. Which way from Craney Island were you *were you* when you first saw the Plymothian? A. This side.

Q. To the south? A. Yes, sir.

Q. How much to the south? A. About a quarter of a mile, not more.

Q. And what did you estimate the distance of the Plymothian at that time? A. As near as I can say, it was three-quarters of a mile.

Q. Had any whistles been blown by the Victory at that time, or did you see her before the whistles were blown? A. I saw her before any whistles were blown.

(144) Q. And you were heading straight with the channel at that time? A. When?

Q. At the time you first saw the Plymothian? A. We were on the east side of the channel, heading straight up parallel with the channel.

Q. And which way did the Plymothian bear from you? A. Two points—at least two points.

Q. On which bow? A. Starboard bow.

Q. And what should you think was her heading? A. Down channel in a right opposite direction to what we were going.

Q. Straight down? A. Straight down when we first saw her.

Q. You hadn't seen her when she came out ef the coal dock? A. No, sir.

Q. What attracted your attention to her? A. I was looking ahead.

Q. How long was that before the Victory whistled? A. I couldn't say how long, sir.

Q. No sound attracted your attention in that direction, then? A. No sound.

Q. Didn't you hear a whistle that caused you to look? A. No, sir; I was looking ahead to see if the vessel's head was swinging, and when I looked ahead I saw her on the starboard bow.

(145) Q. How long after first seeing her was it before the Victory blew any whistles? A. I couldn't say, sir, how long it was.

Q. Did you see her again at the time the Victory blew? A. Yes, sir.

Q. How far away was she then? A. I couldn't say, sir. When I first saw her she was three-quarters of a mile, as near as I can judge the distance.

Q. But you cannot estimate the distance she was away when the whistles were blown? A. We were abreast the first schooner when we blew the first whistles; that is the only thing I can judge by where she was.

Q. The first schooner or the second schooner? A. The first schooner; we blew the first whistles.

Q. And when you blew the second whistles you were abreast of the second schooner? A. Yes, sir.

Q. And how far away was the Plymothian when you blew the second two whistles? A. I couldn't say, sir.

Q. You can't give any idea of the distance, except she was three-quarters of a mile away when you first saw her? A. Yes, sir.

Q. When was it you noticed she was porting? A. About half a minute after I first saw her.

Q. Before your whistles were blown? A. I couldn't say

(146) that, sir.

Q. What is your recollection? A. I think it was between the first and second whistles that she began to port.

Q. You still think it was about half a mile when you first saw her? A. Yes, sir.

Q. How far away do you think she was when you saw her begin to port? A. I could say what distance she was off.

Q. Can you form any idea? A. No, sir. She was less than three quarters of a mile.

Q. That is all you can say? A. Yes, sir.

Q. Can you form a judgment how far she was away? A. No, sir, I cannot.

Q. You cannot form a judgment, but you saw her begin to port about half a minute after you first saw her? A. Yes, sir.

Q. Half a minute after you saw her you say she was swinging under port helm? A. Yes, sir.

Q. When you first saw her you didn't notice that she was swinging at all? A. No, sir.

Q. But about half a minute after, you noticed she was swinging under port helm? A. Yet, sir.

(147) Q. But you are not positive as to when you noticed that with reference to the whistles? A. No, sir.

Q. Now, can you tell me whether it is usual for you to stand at the wheel? A. In that vessel, yes, sir.

Q. Was anyone else on the bridge besides you, the master and the pilot? A. No, sir, no one.

Q. You were the only wheelsman then? A. I was the only one.

Q. Can you tell me how long it was after you first saw the Plymothian that the Victory blew the first signal? A. No, sir.

Q. Can't estimate that time? A. No, sir, can't estimate that time.

Q. You were still at the wheel at the moment of collision? A. Yes, sir.

Q. And where did I understand you to say your vessel was heading for at the moment of collision? A. Right for the end of Lambert's Point pier,

Q. Which way was her head swinging at that time? A. To starboard.

Q. How much inside of the end of Lambert's Point pier had the Victory ever been heading? A. I couldn't say that, sir.

Q. She headed further in shore than the warehouse on the pier? A. No warehouse there, sir.

(148) Q. Is not there a warehouse on the end of that pier? A. No, sir; it is a light-house. Lambert's Point has got a warehouse on it.

Q. And you were heading for the light-house? A. Yes, sir.

Q. How much in shore of the light-house had you ever been heading? A. I couldn't say that.

Q. You had not noticed it? A. I hadn't noticed it until then.

Q. You never noticed what way your vessel was heading until the moment of collision? A. Yes, sir; I did notice it.

Q. Tell me any other time you noticed the heading of your vessel, except the moment of collision? A. All the the time coming up the eastern shore.

Q. For what were you heading? A. Number 7 buoy; kept it a very little on the port side.

Q. You did get that buoy somewhat on your starboard bow, didn't you? A. No, sir.

Q. Never? A. Not to my knowledge.

Q. Had you starboarded for any of those schooners? A. Yes, sir.

Q. Which one? A. All of them. The first one that passed, the second one—

Q. And steadied between? A. Yes, sir.

(149) Q. How much did you starboard for the first one? A. About half a point.

Q. And then steadied? A. Yes, sir.

Q. And then for the second one you starboarded how much? A. About the same.

Q. And then steadied? A. Yes, sir, and when I steadied her I headed for number 7 buoy, keeping it a little on the port bow.

Q. And then you did a little more than steady; you came back to a channel course after starboarding? A. We didn't come into the channel again, sir

Q. Did you measure in any way the length of time that you were reversing? A. How do you mean; time or distance?

Q. In time? A. Yes, sir.

Q. How did you measure it? A. In my own mind, sir—my own observation.

Q. You didn't do it by a clock or watch? A. No, sir.

Q. You just depended on your recollection? A. Yes, sir.

Q. And it seems to you now that you were reversing for four minutes? A. Yes, sir; quite four minutes.

Q. And reversing full speed? A. Yes, sir.

(150) Q. Now, considering the fact that you were running half speed ahead, don't you think if you had been reversing full speed astern for four minutes you would have acquired a very decided stern way, and been going astern very fast in four minutes? A. No, sir, we wouldn't be going astern very fast.

Q. With the engines full speed you make about 9 or 10 knots in the water? A. When going full speed ahead, sir?

Q. Yes? A. About 9, sir.

Q. Don't you make more than 9? A. Not to my knowledge, sir A. I think she averages 9.

Q. And that is under the order "full speed." Do you

know how many revolutions your engines make under that order? A. No, sir; I am not an engineer.

Q. You don't know how many revolutions they make under the order of "half speed"? A. No, sir.

Q. Nor how many they make under the order "slow"? A. No, sir.

Q. You don't know how many miles she goes through the water under the order "slow"? A. I believe it is five, sir.

Q. And under the order "half speed" how much? A. With the order of "slow," sir? I don't know what she will go under "slow," but half speed she will go five, sir.

(151) Q. Under the order "half speed," does not she go nearer 7? A. No, sir.

Q. Are you sure of that? A. Not in my observation in that steamboat. I have not been much in steamboats, but I know our vessel goes about five at half speed and nine at full speed.

Q. (By Mr. FLOYD HUGHES). You say you have not much experience in steam vessels? A. No, sir. What I mean is, that I have not been to sea much in steamboats.

RE-EXAMINATION.

By Mr. SHARP:

Q. From the time the Victory hove anchor until the collision occurred what were you mainly concerned with? A. The wheel, sir.

Q. And did you have time while attending to the wheel to be fixing the position of the schooners you met, the distances apart, and their position with reference to the mid-channel and their position with reference to the western line of the channel? A. Not much. Very little.

Q. Did you attempt to do it? A. No, sir; I didn't attempt it, except in the case of one schooner, when I looked to see in reference to the two buoys on each side, I looked to see if she was in the mid-channel or not.

(152) You have stated that the steamer, from the time she hove anchor until she came near Craney Island, was going at full speed; have you any doubt about that? A. No, sir.

Q. You know that? A. Yes, sir.

Q. You also stated that the steamer slowed down approaching Craney Island; you know that? A. Abreast of Craney Island.

Q. You know that? A. Yes, sir.

Q. Know it is a fact? A. Yes, sir.

Q. You stated that after passing Craney Island and abreast of one of the schooners you saw the Plymothian? A. Yes, sir.

Q. And that she was then over on the western side of the channel? A. Yes, sir.

Q. And that she was then apparently to you about three quarters of a mile off? A. Yes, sir.

Q. Is there any doubt in your mind of those facts? A. In regard to the three quarters of a mile, that is my judgment.

Q. That is a matter of judgment? A. Yes, sir.

A. Do you know it is a fact that she was on the western side when you saw her? A. Yes, sir.

Q. Did you see her come from the western side to the (153) eastern side, as you stated? A. Yes, sir.

Q. She did cross the channel? A. Yes, sir.

Q. From the western to the eastern side? A. Yes, sir.

Q. And you saw her do that? A. Yes, sir.

Q. And the collision occurred on the eastern side? A. Yes, sir.

Q. Near what buoy? A. Number 7.

Q. Close to it? A. Yes, sir; close to it.

Q. And you state, in your judgment, the Victory's engines were reversed from four to five minutes continuously before the collision? A. Yes, sir.

Q. That is your judgment? A. Yes, sir.

Q. You didn't look at any watch? A. No, sir.

Q. That is your firm belief? A. Yes, sir.

Q. You stated that the Victory, from the time you sighted (154) the Plymothian, was on the eastern side of the channel? A. Yes, sir.

Q. Have you any doubt of that? A. No, sir, none at all.

Q. Did you look at the buoy line on the eastern side of the channel? A. Yes, sir.

Q. Were you close upon it? A. Yes, sir.

Q. That you saw? A. Yes, sir.

Q. You say those things occurred, but did you have time to take from your helm to measure the distance the schooners were apart? A. No, sir.

Q. Or make estimates of it? A. No, sir.

Q. When you were attending to the wheel did you look down the stream to see where they went? A. No, sir.

Q. Is it possible for the man at the wheel to watch schooners and steamers after they have gone past him, to see how far they have gone and to see how far off they are? A. No, sir.

Q. Can a man attend to his wheel and do that? A. No, sir.

Q. You have stated that those schooners passed about (155) 100 feet to the west of the Victory? A. Yes, sir.

Q. The Victory about that time was about 40 feet from the channel? A. About 40 yards.

Q. Have you any doubt in your mind as a seaman? A. As a seaman?

Q. Do you know it was 40 yards? A. That is my judgment.

Q. That is your best judgment? A. Yes, sir.

Q. Did you stop to ascertain where the middle line of the channel was, when— A. Only locate it by the buoys on each side of the channel. A casual glance.

Q. Did you give much time, except a casual glance, to find what was the distance between the two buoys? A. No, sir.

Q. Or where the middle line of the channel was? A. No, sir.

Q. But you have no doubt the schooners were west of it from the Victory, at a time when the buoy line was east about 40 yards? A. Yes, sir.

Q. According to your best judgment? A. Yes, sir.

Q. You have also stated that coming from Craney Island (156) you headed for buoy number 7? A. Yes, sir.

Q. Keeping it on your port bow? A. A little on the port bow.

Q. And that shortly before the collision your boat's head was turned in the direction of the light-house at Lambert's Point? A. Yes, sir, at the collision.

Q. And at that time she was pointing a little to the east, after reversing her engines, how was she canting at the time of the collision? A. To the west.

Q. Under starboard helm? A. Yes, sir.

Q. Have you any doubt of that? A. No doubt at all, sir.

Q. Did you see one of the vessels cross the bow of the other; did you see one steamer run across the bow of the other? A. Yes, sir.

Q. Which vessel was it? A. The Plymothian.

Q. (By Mr FLOYD HUGHES.) You are equally certain, I suppose, as you have stated in your direct examination, that the last schooner at the time of the collision was on your starboard bow? A. Yes, sir.

Q. And the second schooner was right abreast of you, (157) 100 feet off? A. No, sir, the second schooner was past us then, sir.

Q. Then you did not so state? A. We were past the first schooner and the second schooner, and the third schooner was on our starboard bow at the time of the collision.

Q. (By Mr. SHARP.) Can you tell how far past the first and second schooners were at the time of the collision? A. No, sir.

Q. The third schooner was on your starboard bow? A. Yes, sir.

Q. (By Mr. MYNDERSE.) How much on your starboard bow; how far away? A. She was close to us, but I couldn't say how far. I was looking at the Plymothian.

JOHN J. CROWELL, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP.

Q. What is your name, age, residence and occupation? A. John J. Crowell, 26, South Shields, England, engineer.

Q. On the 12th day of November, 1891, which was the day of the collision between the Victory and the Plymothian somewhere between Craney Island and Lambert's Point, on what ship were you? A. On the Victory, sir.

(158) Q. On what duty? A. In the engine room.

Q. Doing what duty? A. Working the engines.

Q. You were the engineer on duty? A. I was the engineer on duty.

Q. Were you the engineer on duty from the time the ship hove anchor in Hampton Roads until the collision occurred? A. Yes, sir, I was on duty all the time.

Q. Do you know what speed the Victory made from the time she hove anchor until you got further orders? A. Went full speed,

Q. What was the next order you got? A. Next order I got was "slow."

Q. You were then below? A. Yes, sir, I was standing by the engine.

Q. Could you tell—being below—at what point that was? A. No, sir, I could not.

Q. Had you been running some time at full speed? A. Something over half an hour.

Q. What do you call full speed? A. Well, we will run 60 revolutions at full speed.

Q. How many miles an hour would that be? A. As far as I know it would be about ten, nine or ten.

Q. What would be the reduction of speed from the time you got the second order—what was the second order? A. The second order was full speed astern after slow.

Q. What was the second order you got; the first order was full speed; what was the next order? A. Slow.

(159) How was the boat running at that time; under the order of slow, how many miles an hour? A. I couldn't say the number of miles; we were running 25 revolutions.

Q. Do you know how many miles that ought to be? A. About five miles, I think.

Q. What was the next order you got after that which was to slow? A. The next order I got was full speed astern.

Q. Have you any means of knowing at what time—how long before the collision that was, before you got orders to go full speed astern? A. I have a clock there.

Q. At what moment of time did you get the order? A. At 11 minutes past 4.

Q. At what time did the collision occur? A. Quarter past 4 by our clock.

Q. During those four minutes was the Victory going astern—that is, the engines? A. Yes, sir.

Q. During all that period of time you were backing the engines? A. Four minutes backing full speed astern.

Q. Of that you are positive? A. Yes, sir.

Q. Did you make a record of it at that time? A. Yes, sir.

(160) Q. Have you the book here? A. No, sir; it is in the log-book.

Q. But you know that to be the fact, that it was going full speed astern for four minutes from 11 minutes past 4 to 15 minutes past 4? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. How long have you been second engineer of the Victory, Mr. Crowell? A. One year and nine months.

Q. You say you received orders, after you hove anchor, for full speed ahead, and continued running about half an hour? A. About that time, sir.

Q. And your next order? A. The next order was slow.

Q. How long did you run on that order? A. Six minutes.

Q. You ran six minutes slow? Yes, sir.

Q. And you made five knots an hour through the water? A. As near as I can reckon. I can tell you the number of revolutions of the ship.

Q. And your vessel's speed with that number of revolu-(161) tions is five knots? A. Something like that.

Q. In your position in the engine-room can you hear whistles from your boat? A. Yes, sir, I can hear the whistles.

Q. Did you hear the whistles of the boat that day? A. I heard whistles.

Q. You don't know whether they were your boat or another boat? A. I heard our boat.

Q. Did you hear those whistles before the order for slow was given? A. Couldn't tell you, sir.

Q. Did you hear any after the order of slow was given? A. I couldn't say. I heard them, but when it was I don't know.

Q. It made no impression on your mind? A. No; I have nothing to do with them and took no notice of it.

Q. But you did take very particular notice of how long you went under the order of slow and the order for full speed astern? A. Yes, sir, I did; I have got to note that down.

Q. And you made a record of them at the time? A. Yes, sir.

Q. And in your log-book, of course? A. I don't know what the chief put down. I don't know what is in the log-book; the chief writes that up.

Q. You don't keep a log-book yourself? A. No, sir, I do (162) not.

Q. Where was the Chief on this occasion? A. He was in the engine-room.

Q. Was the entry he made in the log-book, if he made any at all, made at the time and in your presence or not? A. He writes the log-book up in his berth. The time was chalked down on the bunker—on the side of the bulkhead.

Q. Then the entry was not made at the time? A. The entry was made at night, as far as I know. He writes it up at night.

Q. And that was after the collision, of course? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. What is the pitch of your screw? A. 18 feet.

Q. Do you know what slip there is? A. No, sir.

Q. And under the order of full speed she makes 60 revolutions? A. That is, with the full complement of steam.

Q. And under the order of half speed, how many revolutions does she make? A. Well, perhaps about 45; I couldn't say to a revolution or two.

Q. And under the order of slow? A. About 25 or 26.

Q. Do you keep a scrap log-book on board this steamer (163) in the engine-room? A. All the orders we get we keep chalked on the bunker side and then copy them and give them to the chief engineer.

Q. What do you copy them on? A. On a piece of paper and take it to him.

Q. You have no scrap log? A. No, sir.

Q. This is the only log-book that is kept in the engine-room? (exhibiting engineer's log-book, a copy of the entry

of the 12th of November, 1891, *in* which is hereto annexed marked exhibit "B.")

Q. No other record is kept, then, except this book? A. That book there never goes down into the engine-room.

Q. This is the only record that is preserved? A. That is the only one that is preserved.

Q. Do you have regular forms for your reports to the chief engineer? A. Yes, sir.

Q. Printed forms? A. No, sir.

Q. Write them on any paper you find? A. Yes, sir.

Q. Did you receive more than one order in the engine-room from the time you started full speed ahead at your anchorage up to the time you got this order to reverse? A. I received one order to go slow.

Q. You only received one order? A. Yes, sir.

(164) Q. And that to go slow? A. Yes, sir.

Q. What time was it? A. Five minutes past 4.

Q. Exactly? A. Exactly, as well as I could see the clock—as clear as I could see it.

RE-EXAMINATION.

By Mr. SHARP:

Q. Did you have any instrument, if so, what is its name, which repeated to the navigator on the bridge that you had gotten the orders and obeyed them? A. Yes, sir.

Q. What was it called? A. The telegraph.

Q. Did you have an indicator? A. Yes, sir.

Q. Did you use that? A. Yes, sir, I did.

Q. And was the indicator given to the navigator that the order was received and obeyed? A. It was given before the order was obeyed.

Q. The order was obeyed? A. Yes, sir.

Q. And the navigator notified promptly? A. Yes, sir.

(165) DONALD MUNRO, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP:

Q. What is your name, age, residence and occupation? A. Donald Munro, 25, Inverness, engineer.

Q. How long have you been following the water? A. I have been about two years at sea.

Q. How long have you been in the engineering business? A. About nine years altogether.

Q. Two years as a marine engineer? A. Yes, sir.

Q. On the 12th day of November, 1891, which was the day of the collision between the Victory and Plymothian

somewhere between Lambert's Point and Craney Island, where were you? A. I was down in the engine room assisting the second engineer.

Q. What is your employment on the Victory? A. Third engineer.

Q. You were down in the engine room assisting the second engineer? A. Yes, sir.

Q. He was on duty? A. Yes, sir.

Q. And you assisting him? A. Yes, sir.

Q. Do you know the time at which the Victory left her (166) anchor in Hampton Roads? A. I couldn't be sure; somewhere about 4 o'clock.

Q. You don't know the time? A. No, sir.

Q. Do you know what order was rung to the engineer in the matter of speed in leaving the anchorage? A. Ease down.

Q. What was the order you received in leaving Hampton Roads as you hove anchor? A. Ease down.

Q. What does that mean? A. Ease down the engine.

Q. What was your next order? A. To go full speed astern.

Q. At what speed did the boat go in leaving the anchorage in Hampton Roads—when you left the anchorage? Do you know where the ship hove anchor? A. Hampton Roads.

Q. What order did you get in the engine-room when you hove anchor? A. I forget now.

Q. You don't know? A. I don't remember.

Q. What speed did the boat make? A. She ran full speed until she eased down—went about full speed.

Q. Was the first order to go at full speed? A. Don't remember.

(167) Q. You don't know? A. My time down in the engine-room is taken up with other duties. I have to attend to the oiling, etc.

Q. You don't know what the orders were? A. No, sir; I couldn't be certain about them.

Q. The second engineer was attending to the orders? A. Yes, sir.

Q. And you were oiling the engines. A. Yes, sir; that is my duty.

Q. And you don't know what orders he got? A. No, sir; I can't be certain.

Q. Do you know anything about the orders in the matter of backing; if so, state what they were? A. I know the boat got slow, I think, and then full speed astern.

Q. Did you go full speed astern? A. Yes, sir.

Q. How long? A. About four or five minutes, I think, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You know nothing of the collision yourself? A. No, sir; never seen it.

Q. Don't know when it occurred or where it occurred? A. I cannot be certain.

Q. Down in the engine-room you didn't see anything? A. My time being occupied with the oiling, I was not paying much attention.

(168) Q. Your time being occupied with oiling the engines, you did not pay any attention to the orders nor time? A. No, sir.

Q. You were trying to discharge your duties and attend to nothing else? A. Just so, sir.

Q. You don't know whether there were any more orders given than the ones you have stated? A. No, sir.

Q. Or whether various orders were given or what time elapsed between those orders? A. No, sir.

Q. You were oiling your engines the most of the time? A. Yes, sir.

Q. And attending to your other work? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. You left the anchorage, you say, under speed which was substantially full speed? A. No, sir; I am not certain about that; I didn't pay particular attention to the speed.

Q. If the second officer says it was full speed and the first officer says it was full speed, you don't dispute them? A. Well, I don't know.

Q. The second engineer was running the engine? A. Yes, sir.

Q. He testifies that the engines were running full speed (169) after leaving the anchorage. Do you dispute that? A. I don't know. They might, and they might not.

Q. I want you to know. You must know whether you dispute that or not. Answer me. A. I don't understand you.

Q. The second engineer says the engines were going full speed on leaving the anchorage. Do you dispute that? A. No, I don't if he says they were.

Q. You say that the order came to ease down the engines? A. Yes, sir.

Q. What was that order, half speed? A. Slow.

Q. When was that? Just before you reversed? A. Shortly before, I believe.

Q. All in one order? A. No, sir.

Q. Slow and reverse? A. No, sir.

Q? How much time between? A. I reckon about four or five minutes, to the best of my knowledge.

Q. Between the order to slow and the order to reverse? A. Yes, sir.

Q. How long was it from the time you left the anchorage until the collision? A. Couldn't say, sir.

Q. About how long? A. I have no idea.

(170) At 6:30 P. M. adjourned until 10 A. M. Monday morning, 7th instant.

At 10 A. M., December 7th, reassembled, and JAMES PATTISON, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP:

Q. What is your name, age, residence and occupation? A. James Pattison, 33, Jarrow, county of Durham, chief engineer of the British Steamship Victory.

Q. Now, referring to the 12th day of November, 1891, what was your employment? A. Chief engineer of the Victory.

Q. Did you witness the collision between the Victory and the Plymothian on that day—did you see them approach each other? A. No, sir.

Q. Where were you before the collision, at the time of the collision? A. I was standing on the bridge opposite the stoke hole door.

Q. Where did you go after that? A. Down in the engine-room.

Q. When did you arrive there? A. Little over 13 minutes past 4.

Q. At what time did the collision occur? A. 15 minutes past 4.

Q. Did you take a record at the time? A. Yes, sir

(171) Q. Is that the book that contains it? (referring to log-book already introduced.) A. Yes, sir.

By Mr. HUGHES:

Q. Did you make that entry at that time? A. I took a note of it at the time, but wrote it up after. As soon as the vessel struck I looked at the clock.

By Mr. SHARP:

Q. What is the customary hour of writing up that book; do you write it at the time? A. I wrote it up afterwards.

Q. Take memoranda? A. Yes, sir.

Q. On what? A. Generally put them on the bunker bulkhead.

Q. Do so at that time? A. Yes, sir.

Q. For writing up in the usual way? A. Yes, sir.

Q. And you observed the clock? A. Yes, sir.

Q. 15 minutes past 4 at the collision? A. Yes, sir.

Q. What engineer was on duty? A. The second engineer.

Q. You were not on duty on that trip from Hampton Roads to the collision? A. Just at the time after she hove anchor.

(172) Q. After that what person—— A. The Second engineer.

Q. What was the duty of the third engineer? A. Assisting reversing and oiling the engines.

Q. What would be the extent of the assistance to the second engineer? All he had to do was to start the wheel and she would start herself.

Q. For what purpose? A. To start the engines astern or ahead.

Q. What is his name? A. Donald Munro.

Q. The whole business of Donald Munro then, on that trip from heaving anchor until the collision occurred would be starting the engines to go forward or backward? A. Yes, sir.

Q. How long would it take him? A. I think it would take four or five seconds.

Q. The rest of the time he was engaged in oiling the engines? A. Yes, sir.

Q. Did you hear whistles on the ———? A. Heard several whistles.

Q. From what boat? A. I could hear ours sometimes, and others.

Q. You don't know what the whistling was about? A. Have no idea.

Q. You have no idea of the whistling except that you heard your boat whistle and heard other vessels. Where (173) was that? A. On the way up from the anchorage.

Q. Were you below at the time? A. No, I was on deck at the time of the collision.

Q. Which whistled? A. I could not tell you which ones.

Q. Were you in position to see the vessels at the time? A. No, sir, I could not see anything.

Q. Not in position to see anything? A. No, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. Where were you before you went into the engine-room at 4:13? A. I was between the mess-room door and the stoke-hole door, aft on the bridge.

Q. How long had you been there? A. I came out of the engine-room about a quarter to four.

Q. And you remained there until 4:13? A. Yes, sir.

Q. What other whistles did you hear besides your own, and at what time? A. I couldn't say that; I didn't take any notice of the whistles.

Q. Did you hear any whistles after you got in the engine-room? A. No, sir.

Q. Neither your own or others? A. Couldn't say I heard any after I got down there.

(174) Did you hear any immediately before you went down? A. Yes, sir, I heard them, but what time I couldn't tell.

Q. You don't know whether they were your own or others? A. No, sir, I couldn't say.

Q. Whereabouts is your steam whistle with reference to your then position—I mean how far were you from the steam whistle? A. I was close to the steam whistle.

Q. You heard a whistle, then, before you went down into the engine-room, but don't know whether they were your own or from other steamers? A. Couldn't state, no, sir.

Q. How long before, and how many whistles? A. I couldn't tell you, sir, how many.

Examined by Mr. MYNDERSE:

Q. You think it was 4:13 when you went down into the engine-room? A. Yes, sir.

Q. Why did you fix the time at 4:13? A. Got a clock just aft of the ladder.

Q. You looked at it as you went down? A. Yes, sir.

Q. You think it was 4:13? A. Yes, sir.

Q. Why did you go down? A. The captain sung out to me to give her all I could.

Q. Where was the captain? A. On the bridge—the pilot

(175) bridge.

Q. Where he could see you—where you could see him? A. Didn't see him, but he shouted to me.

Q. Did he know you were there? A. Yes, sir.

Q. Had the order to reverse been given? A. Yes, sir; going full speed astern when I went down.

Q. The captain called out before he reversed? A. No, sir.

Q. Did you hear the order to reverse. A. No, sir.

Q. Did you notice any change in the engines? A. No, sir.

Q. Nor until you got down below? A. No, sir.

Q. You are familiar, of course, with the working of engines? A. Yes, sir.

Q. You were standing near the engine-room? A. About 15 yards from the engine-room.

Q. If the engines were working full speed astern you could tell by the movement of the vessel, couldn't you? A. Yes, sir; I could tell that.

Q. You hadn't noticed that until the captain called? A. I didn't take particular notice.

Q. He called to you to give her all you could? A. Yes, sir.

Q. And you went down and found the engines were re-
(176) versing? A. No, sir; the engines were sull speed astern when I got down.

Q. They had been reversed when you got there? A. Yes, sir.

Q. The operation had been completed? A. Yes, sir.

Q. It takes about 5 seconds to do that? A. Yes, sir.

Q. Had you been in the engine-room since leaving the anchorage? A. Yes, sir.

Q. How long were you there after leaving the anchorage? A. From ten minutes to a quarter of an hour.

Q. And then came up on deck? A. Yes, sir.

Q. The engines were running full speed when you came up? A. Full speed ahead.

Q. And you noticed no change until you went down and found them reversing full speed? A. No, sir; can't say I did.

Q. This is the only record of the working of the engines that you preserve on board? (referring to log-book). A. Yes, sir.

Q. When did you write this entry in this book? A. After we finished with the engines—wrote it about 7 o'clock.

Q. This is the regular engine-room log-book? A. Yes, sir.
(177) Were any figures given you by any of the other engineers as to the times at which the engines were worked? A. Yes, sir; the second engineer gave them.

Q. Did he give any others than the ones here? A. Gave the time she ran astern and the time she eased.

Q. You knew there had been a collision at the time you wrote this up? A. Yes, sir.

Q. A very serious collision? A. Yes, sir.

Q. That the other ship had been sunk? A. Never saw the other ship.

Q. You heard she had been sunk? A. Heard they had beached her.

Q. Why didn't you enter in this log-book the movements of the engines? A. It is not customary to give them all. I don't do it, as a rule. It would take pages if I entered all the stops, &c.

Q. This was a rather extraordinary circumstance—running down a ship? A. Yes, sir.

Q. And you knew it would be important to know how the engines had been worked? A. I put down what I could swear to, and I told the Second Engineer to take note of what he had done on his watch.

Q. You enter a good many things on this log besides (178) what you can swear to? A. Yes, sir.

Q. You enter any important thing that is reported to you by the engineer in charge? A. Yes, sir.

Q. And you have no other explanation to give than the one you have given for not putting in here the time the engines were reversed and eased? A. They gave me the time; of course I got that when I was down below.

By Mr. HUGHES:

Q. That is the full and complete record kept on your vessel in your department is it—I mean by that the engineer's department? Is there any other record than this log-book? A. No, sir; there is no other log.

Q. At the time of commencing your voyage was any statement given to you as to the quantity of coal you had on hand? A. No, sir; I look after that myself, as a rule.

Q. Is it not usual to enter in your log-book the quantity of coal you start with? A. Yes, I make an abstract and the end of each trip—I think that log-book commences this trip.

Q. You made a trip from England out here? A. Yes, sir, but I make it out at home and send the abstract to the owners.

Q. But your log-book during the course of the voyage (179) does not inform you or the other officers of your vessel what coal you started with and what coal had been consumed day by day, does it? A. No, sir; I didn't get the quantity of coal that came aboard this time, and have, when I get home, to make the abstract up.

Q. I see an entry on your first page of the date October 28th, 1891, 43 tons of coal? A. That was remaining.

Q. That was what you had on board before you commenced this present voyage? A. Before we commenced to coal.

Q. How far is it from the engine room to the position you were standing at? A. About 15 yards.

RE-EXAMINATION.

By Mr. SHARP:

Q. What was that order the captain gave you? What was the exact language? A. To give her all I could.

Q. That is all he said? A. Yes, sir.

Q. Just those words? A. Give her all you can, Mr. Pattison.

Q. And when you got down you found she was going astern full speed? A. Yes, sir.

(180) Q. Did you have occasion to give her any more? A. Couldn't give her any more; everything was full open.

Q. She was doing her best? A. Yes, sir.

Q. Could she do her best immediately, or would it take some time? A. It would take a little time, but she was doing her best then.

Q. How long will it take a steamer when you are reversing her engines to do her best? A. I should say a full minute before she got her full way on her.

Q. When the engines of your boat or any other steamer are reversed, what would be the number of revelutions, say for the first minute, that she would make, to get her at full speed astern? A. I should say for the first minute she would make from 53 to 54 revolutions.

Q. Would that make any material vibration of the steamer? A. Oh! yes, sir.

Q. Would it increase or dimish afterwards—during the next successive minutes how many revolutions did she make? A. She was making 59 or 60 when I got down.

Q. And how long would it take to get it up to that? A. I should think she would have been running about two minutes when I got below.

Q. From the vibration? A. Yes, sir, about got way on her; she was ——

(181) Q. Do you always notice when the engines are reversed and you are not on duty? A. Sometimes I do and sometimes I do not.

Q. When you are off duty do you not always take notice? A. No, sir.

Q. You leave that to the officer in charge? A. Yes, sir.

Q. You did that on this occasion? A. Yes, sir.

Q. You say when you got below, the second engineer made some statement to you; what was it? A. I asked him, after the boat stopped, how long she had been running astern, and he says "four minutes," and he says "we eased down before that six minutes."

Question objected to on the ground of hearsay.

Q. At what time was that; how long after the ship struck? A. Perhaps three or four minutes.

Q. You hadn't left the engine-room? A. I had not left the engine-room.

Q. Is it customary for you as engineer, whether on duty

or off duty, to take notice of whistles of vessels unless you suspect something is wrong? A. No, sir; never know what whistles are for.

Q. Ought the engineer to pay any attention to that matter? A. No, sir.

By Mr. MYNDERSE:

(182) Q. I understand that during the first minute the engines are reversing they make about 53 or 4 revolutions? A. Yes, sir.

Q. And after they are under full reverse power they make 59 or 60? A. Yes, sir.

Q. When you got to the engine-room, you say, everything had been done that could be done to give them full speed reversing? A. Yes, sir.

Q. I don't suppose you counted the revolutions? A. I have counted them many a time, and have a very good idea of the number.

Q. You did not count them at that time? A. No, sir.

RICHARD MIDDLETON, the next witness, deposed as follows:

Examined by Mr. SHARP:

Q. What is your name, age, residence and occupation? A. Richard Middleton, 27, South Shields, England, able seaman.

Q. How long have you been an able seaman? A. 12 years.

Q. How long have you been following the water? A. (183) About 14 years altogether I may say. I have been fishing a good bit.

Q. Been 12 years an able seaman? A. Yes, sir.

Q. Have you any temporary employment aboard any ship,; if so, what? A. I have been bo'sun and such like.

Q. Of what? A. Steamboats, sir.

Q. How are you employed at present? A. I am able seaman and bo'sun as well, on board the Victory.

Q. What were you on the 12th of November, 1891, on which day there was a collision between the Victory and Plymothian? What was your position then? A. I was bo'sun or acting as bo'sun.

Q. But an able seaman? A. Yes, sir.

Q. Did you see that collision? A. Yes, sir.

Q. Where were you at and before the collision? A. On the fore deck, sir.

Q. At what part of the fore deck? A. About the fore rigging.

Q. What is that called—that part of the fore deck? A.

Call it the forward deck sometimes, and sometimes call it the fore deck.

(184) Q. Were you in position to see ahead? A. Yes, sir. After the first two whistles were blown I went on the forecastle head.

Q. From what vessel? A. From the Victory.

Q. The Victory blew two whistles, and then— A. That called my attention to get on the forecastle head.

Q. What next? A. I saw the Plymotian when she was just on the move on coming down the channel on the western side.

Q. On the western side of the channel? A. Yes, sir.

Q. How far off at that time was she from you? A. I should judge about half a mile or a little better.

Q. Did you continue to keep your eye on the Plymothian from that time until the collision occurred? A. I can't say exactly that I kept my eye on the ship all the time, because I was looking around to see other things.

Q. Did you keep her generally in your eye? A. Oh! yes, sir; I kept a lookout for her.

Q. Did you hear any other whistles from the Victory than the ones you have spoken of? A. Yes, sir; I heard two other blasts.

Q. How far apart? A. I should say about half a minute—less than that.

Q. Where were you when you heard the second set of two blasts? A. On the forecastle head.

(185) Q. You had then seen the Plymothian? A. Yes, sir.

Q. And you say at that time she was about half a mile off? A. Yes, sir.

Q. And on the western side of the channel? A. Yes, sir.

Q. Now describe what happened from that time on? A. We blew our second two blasts on the whistle.

Q. Was there any answer? A. No, sir; I heard no answer at all.

Q. No signals? A. No, sir.

Q. No whistles? A. No, sir.

Q. Did you observe anything? A. I saw steam and water from the whistle, but no sound.

Q. From what whistle? A. The Plymothian's whistle.

Q. But no sound? A. No, sir.

Q. Go on and tell what you saw? A. After we gave the second two blasts on the whistle we we blew three blasts on the whistle from the Victory, and certainly our engines were reversed at the same time to go astern.

Q. At the time of what? A. Just when the three whistles were blown.

(186) Q. That was the time the engines were reversed on the Victory? A. Yes, sir.

Q. The Plymothian was where? A. On the western side, sir; and then she turned to and ported her helm and came right across the channel, and came in contact with our bows.

Q. What was the bearing of the Plymothian when you first saw her? A. About four points on the starboard bow.

Q. Of the Victory? A. Yes, sir.

Q. What course did she appear to move on when she commenced this movement you have spoken of across the channel? A. I could hardly say about the course or anything of that kind.

Q. Approximately? You didn't have a compass? A. She would be, on the west side to come across to the east side, I should say, about N. N. E.

Q. Did she change that course in any way? A. I couldn't say, sir, about that, for the course part, because it is a thing we don't take much notice about.

Q. Did you observe her close before the collision? A. Yes, sir; I saw her come across the channel.

Q. How did she appear to be heading at that time? A. About N. N. E.

Q. But you had no compass and were not exercised at that time about the course? A. No, sir.

(187) Q. She appeared to be about N. N. E. to you? A. Yes, sir.

Q. But you cannot be positive that is correct. Did you hear any danger signal from her? A. Not from the Plymothian; heard no sound from her.

Q. Describe how the striking occurred? A. As I say, she turned to and ported her helm, and it seemed as if—we had our engines reversing astern—and she having too much headway on her, she came on a kind of angle the way he struck us. It was he that struck us; we didn't strike him.

Q. What part of the Victory did the Plymothian strike? A. Right on the stem, sir.

Q. What part of the Plymothian struck the Victory? A. Right abeam, sir.

Q. Do you mean by that nearly midway between the stern and the stem? A. Yes, sir, the break of the bridge.

Q. Which side of the Plymothian was it? A. It would be on the starboard side—no, on the port side.

Q. Of which ship? A The port side of the Plymothian.

Q. The port side of the Plymothian struck the stem of the Victory? A. Yes, sir.

Q. Did the side of the Plymothian strike the side of the Victory? A. No, sir.

(188) Q. The blow was the side of the Plymothian striking the stem of the Victory? A. Yes, sir.

Q. And you say she had too much headway on her? A. Yes, sir.

Q. At what speed did she appear to be going? A. I should say about three or four knots.

Q. You have spoken of the engines of the Victory having been reversed previous to that time. Did you observe anything that would enable you to say whether the Victory was bodily moving backward at the time of the collision or not? A. I looked over the side and I saw the backwater of our own ship just about the fore rigging—just about the forward rigging.

Q. What did that indicate to your mind? A. That she was moving backward.

Q. In your judgment could that occur without the vessel was moving backward? A. No, sir.

Q. You did look over and saw that the backwater was in front of what? A. Just abaft the fore rigging

Q. And that indicated to your mind that the Victory was bodily moving backward? A. Yes, sir.

Q. How long before the collision did it appear to you (189) that the engines of the Victory were reversed? A. I should say about four minutes or four and a half.

Q. They appeared to be reversed? A. Yes, sir.

Q. And that they kept so? A. Yes, sir.

Q. So that at the time of the collision the Victory was not moving ahead? A. No, sir, she had sternway if anything.

Q. But the Plymothian was moving ahead at what appeared to you three or four miles an hour? A. Yes, sir, she would be travelling about that.

Q. You observed her travel from the west side over to the scene of the collision on the east side? A. Yes, sir.

Q. What appeared to be her speed then? A. I should say about the same speed.

Q. You think her speed, then, was not reduced at the time the collision occurred, from what it had been? A. No, sir.

Q. Did you see any movement on her part at any time before the collision that indicated that she was backing her engines or attempting to back? A. No, sir, her engines was going ahead until she struck us, and then they reversed the engines. I couldn't see who sung out from the Plymothian to our ship, and our captain answered them, and they sung out and asked the master of the Victory if she was going astern, and then they rung the telegraph to (190) go astern as well.

Q. How far was the Victory from the Plymothian at that time? A. We had backed out of her at that time.

Q. When one of them sung out? A. I estimated that she was 20 yards.

Q. Before the striking? A. Yes, sir.

Q. About 20 yards before they struck, somebody on the Plymothian sung out to the master of the Victory and asked him what? A. Asked if she was going astern.

Q. And then what occurred? A. They just rung the telegraph to go astern, and certainly before they had time to move the engines they were into us.

Q. Did you see the propeller of the Plymothian move at that time? A. Yes, sir, I was watching that.

Q. What did you see? A. It didn't move until they were within a foot of striking us.

Q. So her speed was not checked up to the time of the collision? A. No, sir, not a bit.

Q. The Victory had been backing over four minutes in your judgment from the time she began to back until the collision? A. Yes, sir.

(191) Q. Could the Victory have done any more than she did to prevent the collision? A. No, sir; I don't see that she could.

Q. Why not? A. There were schooners on one side of us, and we would have gone ashore on the other side, and to have kept ahead we would have gone into her—

Q. You say she would have gone ashore if you did what? A. If we had ported her helm she would have gone ashore—or at least have gone into a schooner.

Q. What helm would have taken her ashore? A. Starboard helm.

Q. And a port helm would have taken her where? A. Into a schooner.

Q. Did you see the schooner? A. Yes, sir.

Q. Where was she? A. Just on our bows when the collision occurred.

Q. How far off was she from your bow at that time—across the channel line? A. You mean the schooner?

Q. How far was the schooner from the Victory at the time of the collision? A. About a ship's length.

Q. She was that distance off from the Victory? A. Yes, sir.

Q. How near was the Plymothian to the shore at the (192) time of the collision? A. Not very far, on the east side. We backed out of her and they turned to and steamed ahead and run her ashore.

Q. How much nearer the shore across the line from the middle of the channel was the Victory and that schooner?

A. I should think they would be about the same distance; the Victory may have been a little nearer the shore than the schooner.

Q. Was the schooner between the Plymothian and the shore? A. Yes, sir.

Q. The schooner was between the Plymothian and the shore? A. Yes, sir.

Q. On which bow of the Victory was the schooner? A. On the port bow.

Q. On the port bow? A. Yes, sir.

Q. Did you see any more schooners than this? A. I saw two more schooners.

Q. Where were they? A. They were coming down the channel as well.

Q. About what distance apart were they? A. About a ship's length, as far as I could say—may have been a little less, if anything.

Q. And there was one, you say, at the time of the collision, which was near the Victory? A. Yes, sir.

Q. And on which bow was that? A. On the port bow.

(193) Q. Right ahead? A. Yes, sir.

Q. Did she move between the eastern shore and the Victory, or on the starboard side of the Victory? A. Which do you mean, the Victory or the Plymothian?

Q. I am speaking of the Victory. Did the schooner move on the starboard side or the port side of the Victory? A. On the starboard side.

Q. She moved down the channel on the starboard side? A. Yes, sir.

Q. Did all the schooners move down on the same side? A. Yes, sir.

Q. And each were about a ship's length— A. Might have been a little less.

Q. All three of those schooners passed down the channel on the starboard side of the Victory? A. Yes, sir.

Q. But at the time of the collision only one of them was near the Victory? A. Yes, sir.

Q. And that she appeared to be on her port bow? A. On her port bow.

Q. Explain how that would be on her port bow if she was moving down the channel on the starboard side of the Victory. A. I don't know. I should say she was about a point, as near as I can get at it, on the port bow.

Q. Under what helm was the Victory at that time? Q.

(194) *Under what helm was the Victory at that time?*

A. I couldn't say, sir; I didn't take particular notice.

Q. Could you see how the Victory was slewing at the time? A. Seemed to be slewing a little to starboard.

Q. And she had been previous to that time? A. She went on the east shore a bit.

Q. That is, she was canting somewhat to port? A. Yes, sir.

Q. But at the time of the collision she was slewing somewhat to the starboard? A. Yes, sir.

Q. And when she was canting over to starboard the schooner would be about one point on the port bow? A. Yes, sir, I should think about that.

Q. Did you see the schooner when she passed abeam of the Victory? A. She was very near abeam when they struck.

Q. When you saw the schooner pass abeam of the Victory going down the stream, how far off was she when she was abeam of the Victory? A. She whouldn't be very far—close, in fact. We couldn't move any way, she was so close.

Q. State how close. A. I have no idea of the distance; she would only be a few yards.

Q. Was she close upon you? A. Yes, sir.

Q. You have stated that the Victory couldn't have ported her helm to avoid a collision with the Plymothian when (195) that schooner was near her? A. No, sir.

Q. And when she was a ship's length off—could she at any time until she moved up abeam have ported her helm and cleared the schooner? A. No, sir; would have run into the schooner.

Q. Just before the collision were you looking at the Plymothian? A. Yes, sir.

Q. Were you much exercised at that time looking at the Plymothian? A. Well, I was watching her after I saw her cross the channel. I thought there would be something happen.

Q. To what was your attention most given, the Plymothian or the schooner? A. I was looking at the Plymothian crossing the channel.

Q. How long before the collision occurred was it that you saw this schooner distant from the Victory about a ship's length, and then saw it apparently off your port bow? About how long before the collision was it that you saw her at that distance? A. Not more than half or three-quarters of a minute before the collision.

Q. And after that time you saw her abreast the Victory? A. Yes, sir.

Q. And before the collision? A. Just before the collision.

(196) Q. Then she passed down abreast of the Victory and on her starboard side, before the collision—more between the Plymothian than the Victory? A. Yes, sir.

Q. Did the Plymothian come up behind the stern of the schooner? A. Do you mean before they struck?

Q. I mean when the Plymothian was moving upon the Victory, was the schooner passing down stream? A. Yes, sir.

Q. I mean when she was right upon her, was the schooner moving down the stream passing the Victory? A. Yes, sir.

Q. The schooner, then, had gone by the Victory? A. Yes, sir.

Q. Being then on her storboard side? A. Yes, sir.

Q. And close to her? A. Yes, sir.

Q. Passing down the stream when the Plymothian came up behind the schooner and ran into the victory? A. Yes, sir.

Q. But you say about half a minute before the collision you saw the schooner before she had reached the bows of the Victory, and she seemed to you then to be off the port bow? A. Yes, sir.

Q. And at that time the collison had not occurred? A. No, sir.

(197) Q. And she was then about a length of a ship off? A. Yes, sir.

Q. But at the time of the collision she was abeam of the Victory, you say? A. Yes, sir.

Q. And close upon her. You have stated that a starboard helm would have taken the Victory ashore? A. Yes, sir.

Q. How close did you say she was on a channel line, in your judgment? A. She would be about 40 yards from the eastern side of the channel line.

Q. Was the Victory ever after passing Craney Island in the middle of the channel? A. No, sir.

Q. Did she ever leave the eastern line of that channel after passing Craney Island? A. No, sir; stuck to the eastern side.

Q. During the whole time passing up the river, after passing Craney Island she was near the eastern side of the channel: A. Yes, sir; close to the eastern side all the time.

Q. Where were you when the anchor was hove? A. On the forecastle head.

Q. Did you see the three river steamers? A. Yes, sir.

Q. Describe the first—where was the first you met? A. The first one passed down and blew two blasts on his whis-
(198) tle, and we repeated it, and the same with the other two.

Q. And you answered that signal? A. We answered all three.

Q. What was the meaning of the signals to the Victory, those two blasts? A. To starboard, sir.

Q. To keep on the starboard side? A. Yes, sir.

Q. All the three steamers passed starboard to starboard? A. Yes, sir.

Q. Did that notice come from the steamers? A. Yes, sir.

Q. Didn't come from the Victory? A. No, sir.

Q. Accepted by the Victory by giving two blasts for each two from them? A. Yes, sir.

Q. And the Victory passed starboard to starboard of each of these three steamers? A. Yes, sir.

Q. Did the Victory pass starboard to starboard to each of those three schooners? A. Yes, sir.

Q. Now, where did you see the second; you say you saw the first some distance below Craney Island? A. The second was a little above Craney Island.

Q. State where the second one was? A. The middle
(199) one would be, I should say, about two ship's lengths from the first.

Q. And the first was below Craney Island? A. Yes, sir.

Q. And where was the third? A. The third would be about a ship's length behind that one.

Q. One was below Craney Island, one above, and one about off Craney Island? A. Yes, sir.

Q. And they passed starboard to starboard to the Victory? A. Yes, sir.

Q. And the three schooners passed starboard to starboard? A. Yes, sir

Q. And the Victory passed all the time on the east— A. Of the other vessels—

Q. And was never in the middle of the channel after passing Craney Island? A. No, sir.

Q. And always on the eastern side of it? A. Yes, sir.

Cross-Examination.

By Mr. Floyd Hughes:

Q. Mr. Middleton, you said that in your judgment the engines were reversed full speed astern from four to four and a half minutes before the collision occurred. A. Yes, sir.

(200) Q. You also state that you passed three steamers and two schooners before the collision? A. Three schooners.

Q. And another schooner was passing you at the time of the collision. Had that third schooner entirely passed you

at the time of the collision, or was she a-beam of you? A. About a-beam of us, sir.

Q. And how far off, did you state? A. The schooner.

Q. Yes, sir? A. Only a few yards off.

Q. When your engines were reversed what vessels were you closest to, the first schooner, the second schooner, or the third schooner? A. She would be the last of the schooners.

Q. You were closest to the last schooner when your engines were reversed? A. Yes, sir.

Q. And how far away were you from that last schooner when your engines were reversed, in your judgment? A. I should say about three or four ship's lengths.

Q. Nearest what vessel were you when you blew your first two signals? A. We was to the first of the three—schooners, you mean?

Q. No; when you blew your first two whistles to the Plymothian, what was the closest vessel to you? A. It was (201) hard to tell which was the closest, the schooner or the Plymothian.

Q. When you blew your first two whistles which of the schooners were you closest to? A. I should say we were closest to the first one.

Q. And nearest what schooner were you when you blew your second two blasts? A. The second schooner had passed us then, and we were closest to the Plymothian.

Q. And how did you state those schooners were apart, in your judgment? A. I should say about a ship's length—maybe less than that. I am not much of a judge of distance.

Q. And your ship's length is a little over 300 feet. Is that what you mean by a ship's length? A. Yes, sir.

Q. All those schooners were going down the river were they not? A. Yes, sir.

Q. How far did those schooners pass from you? A. Just a few yards, sir.

Q. All of them passed just a few yards? A. Yes, sir.

Q. You state that when you first saw the Plymothian, it was immediately after the first two signals were blown, and she was a little more than half a mile from you? A. That was at the first one.

Q. I say, when you first saw her, which was just after (202) you blew the first two whistles, she was little over half a mile from you? A. About that.

Q. She was then on the western side of the channel, about four points off your starboard bow? A. Yes, sir.

Q. Then heading about N. N. E.? A. Yes, sir.

Q. And proceeding down —? A. Well, N. N. E., about.

Q. And proceeding about three and a half knots? A. From three and a half to four knots.

Q. You state you observed her closely from that time up to the collision? A. Yes, sir.

Q. Giving yourself the opportunity of seeing other objects at the same time? A. Yes, sir.

Q. In other words, your eyes were not fastened on the Plymothian to the exclusion of everything else, and during that time you did see the three schooners? A. Yes, sir.

Q. And noted their position accurately? A. Yes, sir.

Q. You repeat you heard nothing from the Plymothian from the time you saw her, up to the collision? A. Never heard a sound.

(203) Q. You saw steam or water issuing at one time from her steam whistle? A. Yes, sir.

Q. But heard no sound? A. No, sir.

Q. Can you make oath that no sound issued from that whistle? A. Yes, sir, well, I would make an oath I never heard it myself. I wouldn't make oath that there was no sound, but it was not in my hearing.

Q. And you had a full opportunity for hearing? A. Yes, sir, I was right forward in the ship.

Q. Did you not hear danger signals from the Plymothian just before you struck? A. No, sir.

Q. What whistles did you hear? A. I heard our own whistles. There were two blasts given on our ship's whistle, and then three.

Q. How far apart were those whistles given? A. The two whistles were given very quick.

Q. Within half a minute? A. I should think a little over half a minute.

Q. And how long between those last two blasts and the danger signals? A. I should think after the last two blasts it was two or three seconds when the three were blown.

Q. How long after the danger signals of three whistles was it before the collision? A. As soon as the three blasts (204) were given the engines were reversed, and we were going astern about four minutes.

Q. Then the danger signals were given before the engines were reversed? A. Yes, sir.

Q. And you were nearer the last schooner at that time than any of the others? A. Yes, sir.

Q. You observed, you say, the propeller of the Plymothian, and can swear it was not reversed until, you said, a foot before the collision? A. Well, I should say a foot or a foot or two. I know there wasn't many feet between.

Q. And then only after the master of the Plymothian had hailed your vessel and ascertained that your engines were going full speed astern? A. Yes, sir.

Q. And all your statements made here are as true as you can make them? A. Yes, sir.

Q. They are based on your best judgment? A. Yes, sir.

Q. You were in position, as you state, to observe everything just before the collision? A. Yes, sir.

Q. And your judgment is based on such observation? A. Yes, sir.

Q. And you don't think you can be mistaken in any (205) statement you have made? A. No, sir.

Examined by Mr. MYNDERSE:

Q. How long have you been on the Victory? A. First voyage in her. About five weeks.

Q. Where did you join her? A. I joined her in South Shields, England.

Q. On what part of the vessel were you at the time you heard the first signal of two blasts? A. Right by the fore rigging on the main deck.

Q. Is that down in a hole? A. Well, it is a hole that will take me about here, sir, standing up.

Q. About four or five feet deep? A. About four feet, sir.

Q. You didn't notice the Plymothian until you heard this signal from the Victory? A. No, sir; that called my attention to her.

Q. And you saw her about four points on your starboard bow? A. Yes, sir.

Q. And distant about half a mile? A. Yes, sir.

Q. Which bow could you see of her then? A. Both bows.

Q. Coming head to head? A. Yes, sir.

Q. So if you had been standing still she would have run (206) into you? A. No, sir, not at that point. When a ship is head on she may be a good distance off, but you may see both bows.

Q. If you had been standing still and she had kept on the same way she was heading at the time you first saw her, which way would she have gone, ahead or astern of you. A. Gone astern of us.

Q. If you had been anchored? A. Gone astern.

Q. She was pointing at that time to go astern of you? A. I don't say she was directly ahead of us, I could certainly see more of one bow than the other, though I could see both bows.

Q. And could you tell that she was swinging at that time? A. They had her helm a little to port I should think.

Q. You took time after seeing her to note these facts as to her position and distance and movement? A. Yes, sir.

Q. And after doing that you went up on the forecastle head? A. Yes, sir.

Q. Did you stay up there until the time of the collision? A. Yes, sir.

Q. What part of the forecastle head? A. Right forward as far as I could get.

Q. Do you know how long that forecastle head is? A. No, sir, couldn't say. The master might tell you,

Q. What were you doing up there? A. That called my attention up there, the first two whistles.

(207) Q. Did you do anything up there? A. Nothing but look on.

Q. Attempted no other work? A. No, sir.

Q. And when you got up there on her forecastle head, way forward, what were her bearings at that time? A. The bearings would be about three points and a half to four points on our starboard bow.

Q. How far away? A. She would be barely half a mile then.

Q. And was any one else up on the forecastle head with you? A. The chief officer was there.

Q. Who got there first? A. I was there, I suppose—a second between the two.

Q. How did you get up on the forecastle head? A. There is a ladder, and bridge as well.

Q. Which way did he come? A. He came across the bridge.

Q. And you came—. A. Off the main deck up on the ladder.

Q. And you think you watched the Plymothian from the the time you got up on the forecastle head? A. Yes, sir.

Q. You were well forward? A. Yes, sir; couldn't go any further unless I went overboard.

Q. And you were there when you heard the Victory blow the second signal? A. Yes, sir.

(208) Q. And heard no reply to it? A. No, sir.

Q. Where was the second mate at that time? A. I think he was on the fore part of the lower bridge.

Q. At the time the second signal was blown? A. Yes, sir.

Q. And you think you got there first on the forecastle head? A. I wouldn't like to swear; but I think there was a moment's difference between us.

Q. Do you know— A. I could say half a minute, or a quarter of a minute. I have no time.

Q. Which got there first? A. I got there first.

Q. Had he gotten there before the second signal of two blasts was blown? A. Yes, sir; I think he was there.

Q. You think he got there. Was he as far forward as you were? A. Yes, sir; right alongside of me.

Q. How long had he been there when this second signal of two blasts was blown? A. He was there, then, from the time the second signal was blown until the collision.

Q. How long did he get there before the second signal (209) was blown? A. About four minutes and a half.

Q. He had been on the forecastle head about four and a half minutes when the second signal was blown? A. No, sir; about four minutes and a half before the collision.

Q. How long had he been there on the forecastle head alongside of you before the Victory blew the second signal of two blasts? A. I wouldn't say he had been there more than two or three seconds, because it was very quick between the two whistles.

Q. He got there just before the second signal was blown? A. Yes, sir.

Q. You say that at one time, about half a minute before the collision, this third schooner was about a point on the Victory's port bow and distant a ship's length. A. Yes, sir.

Q. What kind of length do you mean, a schooner's length or a steamer's length? A. Steamer's length.

Q. The Victory's length? A. Yes, sir.

MICHAEL SCOTT, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP:

(210) Q. What is your name, age, residence, and occupation? A. Michael Scott; 24; Sunderland, England; fireman.

Q. On the day of the collision between the Victory and the Plymothian, which was the 12th of November, 1891, where were you? A. I was on the lower bridge, sir.

Q. Of what? A. Our steamship Victory.

Q. Was that fore or aft? A. Before the collision.

Q. Was that forward or aft? A. Amidship.

Q. Which side were you on? A. Starboard side.

Q. Well, if you saw anything before or at the time of the collision, now begin and tell what you saw from the first. A. I was on duty in the stoke-hole from 12 to 4 that afternoon. I was relieved at 4 o'clock. I washed myself and came on deck. Stepped out of the stoke-hole on the lower bridge, starboard side. While I was on the bridge I heard two whistles from our steamer. I then looked forward and saw another steamer coming in the opposite direction on the

opposite side of the river. Coming down from the bridge on to the fore deck, still looking over the starboard side, I then heard our steamer give two more whistles. I saw the other steamer still coming down the river, and then she suddenly turned so as to come across our bow. I heard our ship then give three whistles, and the engines stopped and (211) started again to go astern, I suppose. I saw the other ship come on and go on—

Q. Stop at that point. At the time you heard the three whistles from the Victory, now tell what the Plymothian did. Describe from that time on. A. Just before we blew our whistles I saw steam coming from the Plymothian's whistles. I don't know whether they blew or not. I didn't hear anything; I heard no sound.

Q. Did you, at any time, hear any whistles from the Plymothian? A. I did not.

Q. But you say you saw steam coming from the steam whistle? A. Yes, sir.

Q. At what time was that? A. When she was beginning to come across the river.

Q. When you first saw the Plymothian, how far off was she from you at that time? A. I couldn't exactly say, sir. I don't know. I couldn't give any idea of the distance, but I saw she was a good way up the river on the other side.

Q. Do you mean by a "good way" a long way? A. Yes, sir.

Q. And which side of the river? A. On the opposite side from us.

Q. Which side were you on? A. The eastern side.

Q. That was the first of your seeing the Plymothian? A. Yes, sir.

(212) Q. A good way off on the opposite side, coming down the river? A. Yes, sir.

Q. Do you mean parallel with the channel? A. Yes, sir.

Q. And on the other side of the channel? A. Yes, sir.

Q. Then you have spoken that after that you saw her change her movement? A. Yes, sir.

Q. At the time you saw her could you tell in what—you are not a sailor? A. No, sir; a fireman.

Q. You don't know points? A. No, sir; don't know the points of a compass.

Q. You saw her change her course and come towards what? A. Towards the Victory.

Q. You saw her cross the channel from the other side to your side, and come and collide with the Victory? A. Yes, sir.

Q. What signals had you heard from the Victory at the time you saw her change her movement? A. When I saw her change her movement I heard three whistles blow from the Victory, after she changed her movement.

Q. Did you hear the first two whistles from the Victory? A. Yes, sir.

Q Did you hear the second two whistles? A. Yes, sir.

Q. How far apart were those two whistles? A. I couldn't exactly say.

Q. Was it short or long? A. Very short time.

Q. You don't know how long? A. No, sir, I don't know how long.

Q. After that time you say you heard the danger signals from the Victory? A. Yes, sir.

Q. Was that a short or a long time? A. Short, sir; only as she started to turn round.

Q. At the time you heard the danger signals from the Victory what was the Plymothian doing? A. I seen the steam coming from the whistle, but I didn't hear any sound. She came on and came right on our bow and shoved her side into our bow.

Q In the matter of quickness, tell how she was moving. A. I should say about three or four knots an hour.

Q. On that oblique movement from the west to the east side of the channel? A. Yes, sir.

Q. You were below before you took that position? A. Yes, sir

Q. You did not see, then, any river steamers? A. No, sir; I was in the stoke-hole at the time.

Q. Did you see any schooners? A. I saw one schooner. (214) Q. Where was that schooner? A. It was nearly abreast of us when we struck.

Q. And going down the channel? A. Going down channel.

Q. How far off was she straight across, when she was abreast of you—was she near or far? A. I should say, to the best of my judgment, she would be about mid-channel. Of course I don't know the distance.

Q. How far off do you suppose, in feet, when she was abreast of you? A. I should say 40 or 50 yards.

Q. Do you know anything of the width of the channel? A. No, sir.

Q. You are a fireman? A. Yes, sir.

Q. You don't know the width of the channel, but she appeared 40 or 50 yards from you? A. Yes, sir.

Q. On which side of the channel was the Victory? A. A. On the east side.

Q. Was she far from the east line of the channel, or

near? A. I should say she was about—do you mean from the buoys?

Q. Yes, sir, from the buoy line? A. I should say she was 40 or 50 yards.

Q. And the schooner, then, was about as far as the buoy line? A. Yes, sir.

Q. Did the Victory pass between the schooner and the (215) buoy line? A. Between the schooner and the buoy line.

Q. Did you observe whether the Victory was going ahead or moving back at the time of the collision? A. Going astern.

Q. Tell your reasons why? A. Because we were going ahead when we first sounded the danger signals, of course, we rung down, and then I saw the steamer's back-wash from the fore part of the bridge.

Q. And what did that indicate to your mind? A. That the steamer was going astern.

Q. And you say the Plymothian was moving across the channel at the rate, in your judgment, of three or four miles an hour? A. Yes, sir.

Q. Did she move any slower when she approached the Victory than when you first saw her? A. No, sir, but he stopped the engines just before she got to us.

Q. How close was she when she stopped her engines? A. I should say certainly not further than the width of this room from our bow.

Q. And he then stopped his engines? A. Yes, sir.

Q. Tell what you saw? A. I saw one or two men run to the side of the ship and look over the stern to see if the engines were going astern.

(216) Q. Was that before or after they stopped her? A. After they stopped her; immediately after.

Q. And at that time Plymothian was right upon the Victory? A. Yes, sir.

Q. And her speed, in your judgment, was unchecked up to that time? A. Yes, sir.

Q. But when she was about the distance of this room you heard what? A. I saw the engines stopped. I could see the wash of the propeller, and knew she had stopped, and I then saw one or two men look over the side.

Q. You saw the beginning of the reversing of the engines of the Plymothian? A. Yes, sir.

Q. You saw the Plymotoian's propeller turn? A. Yes, sir, she was about starting then.

Q. And up to that time she had been moving ahead across the channel from three to four miles an hour? A. Yes, sir.

Q. Was there time after the checking of her speed to make her move slowly—were her engines reversed any time to check her speed? A. No, sir.

Q. Which vessel struck the other? A. The Plymothian struck us across the bow.

Q. What point of the Victory was struck? A. The (217) stem, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You are a fireman, as I understand, Mr. Scott A. Yes, sir.

Q. Do you know anything of the channel of the Elizabeth river? A. I do not.

Q. Do you know anything about the course coming from Lambert's Point pier down the river? A. No, sir; I do not. I don't know navigation at all, sir.

Q. You saw the buoy near which the collision occurred? A. Saw the buoy on our side, sir—the black buoy.

Q. On your port bow? A. Port bow, port side.

Q. You don't know what was the proper course from the buoy up to Lambert's Point, do you A. No, sir; I do not.

Q. When you first saw the Plymothian how far was she from Lambert's Point pier? A. That I couldn't say, sir. I couldn't see Lambert's Point pier from where I was. I was on the opposite side of the ship—on the starboard side.

Q. You were on the starboard side and couldn't see Lambert's Point pier? A. No, sir; didn't notice it.

(218) Q. But you could see the Plymothian? A. Yes, sir; because she was on the same side as I was.

Q. How did you know, if you didn't see Lambert's Point pier, that she was on the other side of the river? A. Because Lambert's Point pier was on our port bow, and the steamer was on our starboard bow?

Q. How much on the starboard bow? A. I don't know the points, but I could see the direction they were ahead.

Q. How were you heading with reference to the buoy at that time? A. Which buoy?

Q. The buoy near which the collision occurred? A. Didn't notice the buoy until after the collision occurred.

Q. You don't know how your ship was heading? A. No, sir.

Q. You don't know how your ship was heading? A. Our ship was heading straight up the river. I don't know how she was by the buoy. I know she was heading straight up the channel.

Q. If you couldn't see the buoy and couldn't see Lambert's Point pier, and could see nothing but the Plymothian, how did you know how she was steering? A. Because our vessel was at a standstill when she struck.

Q. I am speaking of the time you first saw the Plymothian. You have sworn she was on the western side of the channel? A. Because when I am on the lower bridge (219) there's a chart-house there and I can't see that way, but I could see this side. I could see the Plymothian, but I couldn't see Lambert's Point.

Q. And you couldn't see the buoys? A. After she struck, when I came forward, I could see the buoys.

Q. But when you first saw the Plymothian you couldn't see the buoys? A. No, sir; I could not.

Q. Therefore you can only judge the Plymothian was on the western side of the river from the fact that you were going up the river yourself? A. I can judge because I saw her just a little above the Princess, and she was on the other side.

Q. To the southward? A. I don't know whether it was south or not; it was down the river.

Q. Was she between you and the Princess or the other side of the Princess? A. Which way do you mean?

Q. I mean just that way; was she this side or the other side? A. Well, I can't understand your meaning.

Q. Was she between you and the Princess or the other side of the Princess? A. Between us and the Princess.

Q. You saw the Princess then? A. I did, sir.

(220) Q. How was the Princess—? A. I didn't exactly notice—.

Q. Just let me finish my question. How was the Princess, on the port or starboard of the Plymothian as you saw her then? A. Well, the Princess was on the left hand side coming down the river. I think it was the starboard of the Plymothian coming down the river.

Q. Then, as I understand, you were coming up the river, and you saw the Plymothian up ahead, and you saw the Princess further to your starboard than the Plymothian. Did you see the Princess across the Plymothian's bow or across her stern? A. I saw her across her stern.

Q. How many schooners did you see when you came up? A. Saw one.

Q. Never saw but one? A. I only saw one.

Q. How long after you came out was it before the danger signal was sounded? A. I couldn't say exactly; I suppose a couple of minutes or so.

Q. Had you come out when the first signals were sounded? A. I was out when the first whistles were sounded.

Q. You saw only *on* schooner? A. I just noticed only one schooner.

Q. How far was that schooner from you? A. I said
(221) about 40 or 50 yards.

Q. Was she on your port or starboard bow? A. Starboard bow.

Q. And that was at the time you sounded the first set of two whistles? A. I didn't see the schooner when we sounded the first two whistles. When I saw the schooner was when she struck us; she was then abreast of us. I didn't notice her until she was abreast of us.

Q. You were in your position of observation when the first two whistles were sounded, I understand, on the lower bridge? A. Yes, sir.

Q. Looking ahead when the first two whistles were sounded? A. Yes, sir.

Q. And could see well to the head of you and to starboard? A. I could see ahead of the bow.

Q. And to starboard, but couldn't see the port side? A. Couldn't see the port side, sir.

Q. And yet you saw, when those two first whistles were sounded, nothing except the Plymothian ahead of you? A. I didn't notice anything, sir; I was looking more at the Plymothian than anything else.

Q. And you didn't see the schooner, or didn't notice her until at the moment of collision, when you noticed she was abreast of you? A. Until after the collision, when the vessel struck.

(222) Q. But you were looking ahead the whole time at the Plymothian? A. Yes, sir, I was looking at the Plymothian.

Q. And were in a position commanding a full view of the river on your starboard bow and beam? A. No, sir; I could only command a view of the starboard bow at the time the first two whistles were sounded.

Q. How about your beam? A. There is a life-boat on the beam, and I couldn't see through the life-boat.

Q. How was it, then, that you saw the schooner? A. Because I was standing on the fore-deck at the time of the collision.

Q. Then you went ahead? A. I didn't think there was going to be any collision; I was going off watch; I had wet clothes on—

Q. How did you get from the lower bridge to the fore deck? Q. Down the ladder.

Q. And you went down the ladder from the lower bridge to the fore deck? A. Yes, sir.

Q. And where did you stand? A Stood forward against the fore rigging,

Q. On the starboard bow? A. On the starboard side.

Q. Describe the fore deck and the forecastle deck, if there is any distinction. A. Is that the forecastle head, sir? (223) There is a forecastle deck, the place where the men live in—I suppose it will be about eight feet high.

Q. That is above the fore deck? A. Yes, sir.

Q. How far is that forward of the fore rigging? A. I couldn't exactly say how many feet it is.

Q. I am just asking your judgment? A. From here to that column, or something like that (pointing to column about 20 feet from him).

Q. About 20 to 25 feet. And being in that position you didn't notice anything except the Plymothian, until after the collision, and then you noticed this schooner? Q. Yes, sir.

Q. You saw no other schooners? A. No, sir; just the one.

Q. Had you reached the fore rigging at the time the danger signals were sounded? A. Yes, sir; I was against the fore rigging when the danger signals were sounded.

Q. And they came immediately after the second blast of two whistles? A. After the vessel turned round; shortly after.

Q. I am talking about the danger signals. I say they came immediately after the second set of two whistles? A. Not immediately after; very shortly after.

Q. And you judge that the engines were reversed full speed at least four minutes before the collision? A. Yes, (224) sir; I reckon the engines were going astern about four or five minutes, to the best of judgment, before this collision.

Examined by Mr. Mynderse:

Q. This fore deck is a kind of well between the lower bridge and the forecastle head? A. It is a well deck.

Q. And when you are down on the fore deck you cannot see forward? A. Oh! yes, sir; see part of the way forward whichever side you are on.

Q. Can't see over the forecastle head? A. No, sir.

Q. How high are the bulwarks? A. You can see over them.

Q. The fore rigging come down at the fore deck? A. Comes down from the foremast.

Q. And when you say you were against the fore rigging, that was when you were on the fore deck? A. Yes, sir.

Q. When did you start to go to the fore deck? A. I was walking all the time, from the time the first two whistles were blown.

Q. You were walking when the first two whistles were blown? A. I was standing at that time, and then commenced walking.

Q. And went down against the fore rigging? A. Yes, sir.

(225) Q. And were there when the second whistles were blown, and the danger signal? A. I was hardly there when the second whistles were blown, I was on the ladder looking over the rail when the three whistles were blown.

Q. Where was it that you made your observation of the Plymothian? A. When I was on the fore deck.

Q. Could you see her then? A. Yes, could see her all the time.

Q. And you didn't see her propeller reverse until just before the collision? A. I did not.

Q. What did you see of the propeller? A. I could see the wash from the propeller; she was light with cotton.

Q. Could you see the blades? A. I could not. I could see the wash from the wheel.

Q. Had it been going around when you saw it begin to reverse? A. It was going ahead. I saw it stop.

Q. How long did it stop? A. I couldn't exactly say how long, I don't know.

Q. About how long was it stopped? A. I couldn't exactly say; it was very short. I couldn't give the exact time. I was looking at something else.

Q. What was it you were looking at? A. I was not (226) looking at anything; but I was looking at the other ship, of course, and I saw her stop.

Q. Can you give me a judgment of how long she was stopped? A. She was stopped no length of time. I couldn't give you a definite idea of the time.

Q. Give me the best judgment you can? A. No more than half a minute.

Q. Do you know what kind of a propeller she has? A. I suppose a four blade propeller.

Q. Right handed or left handed? A. I suppose a right handed propeller.

Q. How did you judge that? A. I suppose because she has got her discharge upon her port side. I don't know whether she has got a right handed propeller or a left handed propeller.

Q. If you don't know what kind of propeller the vessel had, how could you tell whether the engines were reversed or going ahead? A. I didn't see the propeller at all, but I see the wash from the propeller. I couldn't tell whether she was going ahead or astern, but the engines were stopped and then started again.

Q. You say they stopped and started again, but you don't know which way they turned? A. I do not.

Q. Who else was with you on the fore deck? A. My watch mate.

(227) Q. What is his name? A. I think they call him Wood, if I am not mistaken.

Q. Anyone else? A. Not that I know of.

RE-EXAMINATION.

By Mr. SHARP:

Q. Are firemen in the habit of watching passing schooners? A. Not in the habit of watching sailing ships at all; got no use for sailing ships.

Q. Are you engaged in the business of watching passing schooners? A. No, sir; I am not.

Q. Don't take much interest in it? A. No, sir.

Q. You say you didn't see any schooner until the collision actually occurred? A. I did not.

Q And then you saw one schooner abeam? A. Yes, sir.

Q. When you were in position to see her? A. I was on the fore deck, and after we struck I looked around and saw her.

Q. On the starboard side? A. Yes, sir.

Q. Going down the stream? A. Yes, sir.

Q. A short distance from the Victory? A. About 40 or (228) 50 yards, I suppose.

Q. You say you were always on the starboard side before the collision? A. Yes, sir; on the starboard side.

Q. Not on the port side? A. Not at that time.

Q. And as the Victory was moving up the river, and you on the starboard side, you couldn't see Lambert's Point pier? A. No, sir; could not.

Q. But you could see the western side of the river. A. Yes, sir.

Q. And you did see from the starboard side the Plymothian coming down the river? A. Yes, sir; saw her coming down and saw her cross over and cross our bow.

Q. That you are quite certain of. A. Yes, sir.

Q. And at that time you could not see from your position to Lambert's Point? A. No, sir; couldn't see on the port side.

Q. And you could see the Princess? A. Yes, sir.

Q. And between the Princess and you, you could see the Plymothian? A. Yes, sir.

Q. Both on the starboard side? A. Yes, sir.

Q. But you couldn't see Lambert's Point because you were (229) on the starboard side? A. Yes sir.

Q. And all the time the Plymothian was crossing the channel, from the time you saw her until the collision, she was on the starboard side? A. Yes, sir.

Q. And you couldn't see her if you were on the port side? A. No, sir.

SAMUEL STEWART, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP:

Q. What is your name, age, residence and occupation? A. Samuel Stewart, 26, South Shields, England, second officer of the Victory.

Q. State whether that was your position on the 12th day of November, 1891, which was the day of the collision between the Victory and the steamship Plymothian? A. Yes, sir.

Q. That was your occupation? A. Yes, sir.

Q. How long have you been following the water? A. About 12 years, sir.

Q. How long have you been officer of the Victory? A. (230) Since last March.

Q. March, 1891? A. Yes, sir.

Q. How long have you been an officer of a ship? A. About three years and a half.

Q. On the 12th of November, 1891, which was the collision day, for a number of minutes previous to the collision where were you stationed, and what were you doing? A. I was on the after main deck at the time.

Q. On the after main deck? A. Yes, sir.

Q. Were you in charge of that part of the ship? A. Yes, sir.

Q. And the men that were there? A. Yes, sir, I was in charge of the watch aft.

Q. That was your position? A. Yes, sir.

Q. And your duty was to attend to that part of the ship? A. Yes, sir.

Q. Where were you when the ship hove anchor? A. I was at the after end of the ship.

Q. Still there? A. Yes, sir.

Q. Do you recollect her coming up to Craney Island? A. No, sir, I did not see anything that occurred.

Q. Do you recollect her coming up to Craney Island? A. Of course I recollect coming up the channel.

Q. Tell what speed she was making up to Craney Island? (231) A. I couldn't state the speed.

Q. You were aft? A. I was aft and didn't notice anything that passed; I was too busy.

Q. Do you recollect passing Craney Island? A. No, sir.

Q. Did you give your attention to passing vessels passing Craney Island? A. Not until the scene of the collision.

Q. You were occupied with your work? A. Yes, sir.

Q. Now, state what you know of the collision, where the Plymothian was before and at the collision. Just describe it? A. Well, the first I saw of the Plymothian she would be about four points on our starboard bow, from 240 to 250 yards off, and then she was proceeding on an angle—she was coming down about N. N. E., with her helm to port, about N. E.

Q. Then, at the time you saw her, she was moving on a course first about N. N. E., as you judge? A. Yes, sir; that is approximate.

Q. You didn't have a compass? A. No, sir.

Q. But that is about her course, to the best of your judgment? A. Until the collision, when she was heading about N. E.

Q. How long before the collision was it before she changed her course from N. N. E. to N. E.? A. She was gradually coming around.

(232) Q. Where was she coming from? A. From the western side of the channel.

Q. Could you see that from where you were? A. Yes, sir.

Q. Which side were you on? A. Starboard side, main deck.

Q. From where you were could you see objects on the port side or ahead of you? A. No, sir; nothing.

Q. Only see from the starboard side? A. That is all.

Q. And being on the starboard side and being aft, you looked over to starboard and saw her coming? A. Yes, sir.

Q. And saw her coming across the channel? A. Just so.

Q. Being at the time from 200 to 250 yards off? A. From 240 to 250, as well as I could judge.

Q. And at first she appeared to be moving N. N. E., but in swinging under port helm she brought up to moving about N. E. at the time of the collision? A. Yes, sir.

Q. And the collision occurred on the west or east side of the channel? A. The east side.

Q. Near what buoy? A. Number 7.

(233) Q. How close to the buoy? A. I didn't see the buoy at the time of the collision, but soon after the collision that buoy came around from the starboard side of the Plymothian to the port

Q. The collision, then, was close to the buoy? A. Yes, sir.

Q. Did you have an opportunity to observe, if so, what, if the Victory was moving on the east side of the channel, the west side of the channel or the middle of the channel, in coming from Craney Island to tho collision? A. Moved on the east side.

Q. All the time? A. Yes, sir.

Q. Did she ever move after passing Craney Island in the middle of the channel? A. At the time I got up and saw the Plymothian we were well down on the eastern side.

Q. You didn't observe previous to that? A. No, sir.

Q. You observed from the time you saw the Plymothian coming? A. Yes, sir; we were close on the eastern side of the channel.

Q. And you did not see her moving except on the eastern side, after passing Craney Island? A. Yes, sir.

Q. But your attention was given to your business until you were about 240 or 250 yards, when your attention was called (234) to her. A. Yes, sir.

Q. And you were then looking over the starboard side of the Victory at her? A. Yes, sir; but at the time of the collision I was on the lower bridge.

Q. How did you get to the lower bridge? A. By coming up the ladder walking forward.

Q. What did you see when you got forward? A. I saw her as she would be about a ship's lenth off, still on the starboard side of the lower bridge.

Q. And you saw the Plymothian about a ship's length from the Victory? A. Yes, sir.

Q. What speed did she appear to be going? A. Appeared to me to be going about three or four knots.

Q. Did she move slower? A. I didn't see her move any slower; she seemed to be going about the same speed up to the time we collided.

Q. You saw no checking of her speed, then, or anything to indicate the checking of her speed from the time you first saw her until the collision actually occurred. Did you hear any whistle from the Plymothian? A. I did not.

Q. Did you hear any whistles to the Victory from any vessels ahead at any time? A. None, sir.

Q. Was your attention given to whistles? A. Not at all (235) until I heard our three blasts.

Q. You did not, then, hear the two blasts? A. I heard them but did not take any notice.

Q. Did you hear her first whistles? A. I heard her give two blasts.

Q. Did you pay any attention? A. No, sir, I was attending to my business.

Q. But when you heard the danger signals you looked ——? A. Not at the moment.

Q. After that time you left your business and went to the starboard side? A. Yes, sir, to see what was coming down.

Q. And when you looked out the starboard side you saw the Plymothian crossing the channel. A. Yes, sir.

Q. From the west to the east? A. Yes, sir.

Q. And at first moving apparently N. N. E.? A. Yes, sir.

Q. And swinging around under port helm until she was moving N. E.? A. Yes, sir.

Q. And with the speed about the same? A. Yes, sir.

Q. And is that all you know of the matter? A. Yes, sir, except there was a schooner on our starboard side.

(236) Q. Did you notice any river steamers or schooners? A. No, sir, that is the only one I noticed—the one opposite.

Q. And there was a vessel ——? A. The two schooners were about a ship's length from each other.

Q. When did you see that? A. When I came on the bridge.

Q. You then noticed two schooners distant from each other, one ahead of the other, both going down stream, and apart about a ship's length? A. Yes, sir.

Q. But you had not noticed any schooners or vessels previous to that time? A. No, sir.

Q. Besides the Plymothian, which you noticed when you were aft? A. Yes, sir.

Q. At the time of the collision did you notice where the hindmost schooner was? A. There was one right abeam.

Q. How far to the west of the Victory was that last schooner when you observed it? A. About 90 feet to the west of us.

Q. She passed, then, close to the Victory going down stream? A. Yes, sir.

Q. Now, sir, in the position the schooner was, and the point she was coming from, could the Victory have ported (237) her helm with safety to avoid the Plymothian? A. No, sir.

Q. What would have happened? A. She would have collided with the schooner.

Q. Now as to the schooners—you say lower down you saw a schooner, when you came forward. A. One close abeam and the other further down.

Q. And you didn't see the third schooner at all? A. No, sir.

Q. But from where you were you looked back and saw

the two schooners, and they were close to the Victory with respect to the width of the channel? A. Yes, sir.

Q. But were distant from each other about a length of the Victory? A. Yes, sir, about 300 feet.

Q. Did I understand you to say the hindmost schooner was about 90 feet from the Victory? A. From 90 to 100.

Q. And you have stated that there could have been no porting of the helm of the Victory without colliding with that hindmost schooner? A. Yes, sir.

Q. Now, before that time, say within a space of three to five minutes, could the Victory have ported her helm so as to safely pass between those two schooners? You didn't see them until you came forward, but after you came forward you saw where they were. Now, they being where (238) they were, can you tell whether by porting her helm the Victory could have passed safely between those schooners? A. No, sir, I don't think she could.

Q. Could she, in your judgment, have cleared the foremost of the schooners if she had ported her helm before you saw her? A. No, sir.

Q. What could the Victory do to prevent that collision that she did not do? A. I did not see anything.

Q. Suppose she had starboarded her helm? A. She would have gone ashore.

Q. Suppose she had ported her helm? A. She would have run over the top of one of those schooners.

Q. And she did what? A. Stopped her engines and came astern.

Q. Do you know the fact that the engines were stopped? A. Yes, sir; I can tell without seeing the telegraph when the engines are stopped.

Q. And how long do you suppose it was that her engines were stopped and reversed? A. About four or five minutes before the collision.

Q. Have you any doubt about its being as much as that time? A. It is only approximate.

Q. You don't know that fact? A. I don't know that fact.

Q. But that is your best judgment? A. Yes, sir.

(239) Q. And you are confident that it so? A. Yes, sir.

Q. Did you look to see if there was any backwater from the Victory? A. Yes, sir; when I got up and looked over the rail I saw the backwater come forward then from the forward part of the bridge.

Q. It was where you could see it when you went forward? A. When I was on the bridge the backwater was forward of the bridge.

Q. And that was forward of the midships? A. Yes, sir.

Q. Could that have happened unless the Victory was bodily moving backward? A. Of course all ships send water forward before they go astern, but that far ahead, I suppose she was going astern.

Q. A ship throws some water ahead when she is reversing her engines, but you have never seen a ship throwing water as far as that was unless the ship was moving actually through the water? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. HUGHES:

Q. Has the tide any influence in throwing that backwash? A. The tide has no effect on the ship—not much.

(240) Q. I am talking about the backwash as indicating whether the ship has gotten stern way or not. A. No, sir.

Q. The backwash would go as far forward, then, with the tide against the vessel as it would with the vessel before she commenced to gain her stern way? Q. I don't think the tide would make any difference at all.

Q. How far from the bow of the Plymothian was buoy number 7 at the time of the collision? A. I couldn't see it at the time of collision, but it was on her starboard bow.

Q. On the Plymothian's starboard bow? A. Yes, sir.

Q. State where the collision occurred with reference to that buoy; was it north, south, or west? A. To the north.

Q. And it was not to the south? A. No, sir.

Q. And it was on the Plymothian's starboard bow? A. Yes, sir.

Q. How far off? A. I couldn't see the buoy. I couldn't see through the ship.

Q. But you saw the Plymothian before she came into collision? A. Yes, sir.

Q. Did you see the buoy? A. Didn't notice it then.

(241) Q. Didn't notice it until after the collision? A. No, sir.

Q. And you can form no judgment how far the buoy was from the bow of the Plymothian at the time of collision? A. No, sir; I know it couldn't be far, though.

Q. You estimate the speed of the Plymothian at the time of collision at what? A. From three to four knots.

Q. Ahead, of course? A. Yes, sir.

Q. And you were busy on your main deck? A. After main deck.

Q. Attending to your duties as second officer, with a gang of men under you, from the time you came up from Hampton Roads until shortly before the collision? A. Yes, sir.

Q. And did not observe the river steamer or the schooners? A. Only those two schooners.

Q. You know nothing of what was ahead of the first schooner you saw? A. No, sir; I didn't see anything.

Q. Yet you have sworn in your direct testimony that your vessel could not have crossed over to the west side of the channel before you met the first of the two schooners? A. Yes, sir; that's what I swore.

Q. And you swear that, when you know nothing of what was ahead of that schooner, or whether the river was clear (242) or not? A. Yes, sir.

Q. You noticed nothing until the danger signal was sounded, and then what did you do? A. I didn't get up right away then; but I felt the engines coming astern, and then I got up and saw the Plymothian.

Q. What do you mean by getting up? A. I was looking down the hatch at the time, superintending getting up the ropes.

Q. You straightened up then, and what did you do? Remain standing where you were? Could you see the Plymothian from that position? A. No, sir; I went to the rail.

Q. You went to the rail on your starboard side? A. Yes, sir.

Q. And then you saw the Plymothian heading across your starboard bow, from 240 to 250 yards? A. Yes, sir.

Q. Then what did you do? A. I stood there a few seconds, and then went up on the bridge, when I thought something was wrong.

Q. How far was the bridge from the position at which you were standing at the rail? A. I couldn't tell you exactly; I guess it would be about 80 or 90 feet.

Q. And you had to go up steps when you reached the bridge from your deck? A. Yes, sir.

(243) Q. Well, what position did you take upon reaching the bridge? A. Well, I went to the fore part of the bridge, and stood until I saw the whole of the affair.

Q. When did you first observe this schooner? A. Not until after the collision occurred, and then I looked and saw this one right abeam of us.

Q. And you also saw another one, you say? A. Yes, sir.

Q. You hadn't observed any of these schooners at the time you were at your starboard rail, when you observed the Plymothian? A. Well, I was watching the Plymothian the most, but I caught a glimpse of them, but how they were I couldn't say exactly.

Q. You did get a glimpse of them? A. Yes, sir.

Q. Then, you did see them before you got on the lower bridge? A. Yes, sir.

Q. And that is your statement now, is it? A. Yes, sir.

Q. Well, now, where was that first schooner with respect

to your vessel when you first saw them upon reaching the rail on your starboard side? A. The schooner would be ahead of us a little at the time, but I just got a glimpse of them like, from the rail, and then ran away to the bridge. (244) Q. How was the last schooner? A. The last schooner was abreast of us at the time of the collision

Q. You didn't notice her until aft? A. I saw her aft, and then didn't notice her again until the collision, and then she was a little abreast of us.

Q. What was the position of the last one when you reached your starboard rail? A. I didn't see that one then. I got a glimpse, but you can't take everything in at a glance—at least, I can't.

Q. Yet, you did see the Plymothian? A. Yes, sir.

Q. And she was on your starboard bow? A. Yes, sir.

Q. About 240 yards off, and you saw her distinctly? A. I saw her distinctly; that was the object I was looking at.

Q. Nothing obstructed your vision of her? A. No, sir; there was not.

Q. You could see her distinctly without any obstruction? A. That I couldn't say—about the obstruction.

Q. Don't you think you would have noticed a schooner if she had been in your immediate line of vision? A. I couldn't say whether I would or not. As I said before, you can't take everything in at a glance.

Q. But you did take in the Plymothian and took in the first schooner that was astern of you? A. The first schooner.

Q. You say you saw her when you reached your starboard (245) rail, and she was astern of you? A. I did not. I say she was a little above our beam.

Q. And then the first schooner was a little ahead of your beam when you reached the starboard rail? A. Yes, sir.

Q. You are certain that was the first schooner? A. There were two I saw, and that was the first one.

Q. And that was after the danger signal had been sounded? A. Yes, sir.

Q. After you felt the engines going astern, and after you walked from the hatch where you were looking down to the rail? A. Yes, sir. When I raised up at the hatch I could see over.

Q. And then this first schooner was a little above the beam? A. Yes, sir.

Q. And you didn't notice the other schooner that you afterwards observed just abeam of you at the time of collision? A. Not until the scene of the collision.

Q. You didn't observe her at that time? A. I didn't take notice of her.

Q. And the schooner that you first observed at the time of collision was astern of you, and the second schooner was just abeam of you. And how far do you think the schooners were apart? A. About a ship's length.

Q. Which is about a little over 300 feet? A. About a (246) ship's length, yes, sir.

Q. You heard no whistles from the Plymothian? A. None at all.

Q. Even at the moment of collision? A. No, sir, I did not then.

Q. Were any whistles sounded by either vessel at the moment of collision, or afterwards? A. I didn't notice any.

Q. Did you hear any bells on the Plymothian at the time of collision, or immediately thereafter? A. No, sir.

Q. What did she proceed to do after the collision? A. I went on the forecastle head.

Q. What did the Plymothian do? A. The Plymothian backed astern more into the channel, and then the engines were stopped again and she proceeded on to the beach.

Q. The Plymothian backed astern and then stopped her engines and then proceeded to beach herself on the eastern side of the river. When did you notice this buoy number 7? A. After the collision occurred.

Q. Where was it then? A. It would be then about two points on our port bow.

Q. And how about it in respect to the Plymothian? A. I dare say it would be on her port bow, because it came around her stem after she commenced backing, like as if (247) the tide had been pressing her on top of the buoy.

Q. And how was that schooner with reference to the channel of the river, was she on the east side, the west side or right in the channel? A. I should say on the eastern side of the middle line.

Q. And how far from your vessel? A. About 90 to 100 feet, I should think.

Examined by Mr. MYNDERSE:

Q. Have you ever been on a steamer lying in dock and reversing her engines? A. Yes, sir.

Q. You noticed, I suppose, that the backwater would run away toward the head of the steamer? A. Yes, sir; it would draw ahead.

Q. (by Mr. SHARP) You stated that in your judgment the tide would not have any influence on the backwater of a steamer? Yes, sir, I stated that.

Q. Now, give your reasons for that? A. I think the tide

has the same effect with the whole ship. The ship is drifting up the whole time.

Q. And as the whole ship is drifting— A. Of course, as you are backing the ship it will tend to cant the ship.

Q. And to that extent would there be any influence of the tide, would the canting have any effect on the backwater if the tide was flood or if the tide was ebb? A. The (248) canting?

Q. Yes; you state, in consequence of the whole ship being moved, and not a part of it, the tide would not have any effect on the backwater, but you said something about the ship would cant— A. Of course, the backwater would be driven up all the time the ship's engines were backing.

Q. As the whole ship would move and not a part of it? A. Of course, the flood tide will have the most effect on the deeper end of the ship.

Q. And the deepest end of your ship was aft? A. Aft.

Q. Describe the effect of the flood tide, then, upon a ship that was moving as your ship was, with the after part deeper in the water? A. Well, when the engines come astern your ship is going through the water, and in time it is going to stop her, and before it stops her I should say the backwater would be up half way along the ship, or thereabouts.

Q. Then she was actually stopped? A. Yes, sir.

Q. For what reason? A. Bringing the engines back.

Q. Go on; say how much more it would be when actually moving backward? A. Before we stopped our head was canting in to port, to the east side of the channel; then at the time of the collision—

(249) You mean when you stopped the engines? A. No, when she was going astern, and when she began to get stern way, she was canting her head over to starboard a little. I could see that from the bridge and Lambert's Point.

Q. The ship, then, just before the collision, was canting a little to starboard? A. Yes, sir.

Q. Go on and give the effect of the tide; that canting caused the tide to have some influence on the backwater? A. Yes, sir; but then the engines *the engines* got more power, and when she got stern way on her, it canted her over to starboard.

Q. The canting, then, caused her to starboard? A. No, sir; the water is going forward all the time.

Q. You say the engine overcomes the influence of the tide? A. Of the flood-tide; and she was going back over the tide a little, and canting to starboard.

Q. When actually going back the engines overcame the

tide and caused the tide to run forward of the middle line of the steamer. A. Here is your ship here that is going up the channel—(explaining with a pencil on the table).

Q. You can't put that down in writing; just talk. A. I am talking as plain as I can.

Q. Just describe the effect of the tide on the ship when she is moving. A. If you are in a tide way, you are going (250) to be drifted along with the tide.

Q. Well? A. That's all I know about it.

Q. The question I put is this: Give your reasons for supposing, as you do, that the flood-tide would have any effect in making the backwater come forward of the mid-ships. A. It is the engines does that, according to my ideas.

Q. Describe the movement of the engines. A. When you back the engines full speed astern it is bound to send the backwater forward.

Q. From the time the engines are reversed? A. Yes, sir.

Q. And you say, as I understand, that when the backwater had come to the forward part of the ship, it is an indication that the ship has got stern away? A. Yes, sir.

Q. Now, I want you to tell why the tide has no effect on the backwater. A. It will.

Q. Then you say if the ship is getting under stern way the tide will help the back wash? A. Yes, sir.

Q. But it will not assist if the ship is actualty going backwards? A. Yes, sir.

Q. Then your opinion is that the flood-tide will have no (251) effect in making the backwater come to the forward part of the ship until the ship herself had stern way and wrs actually moving back through the water? A. Yes, sir.

Q. But from the time she acquired stern way, and was actually moving backward through the water, the tide would assist? A. In sending it forward.

Q. Now with reference to this matter of the schooners? I understand you to say that before you left your position on the after part of your steamer—before you went forward you got a mere glimpse of two schooners? A. Yes, sir.

Q. But at that time you didn't take in the situation of the schooners? A. No, sir.

Q. That you merely saw them; that the schooner that was ahead of the other had not passed abeam your boat? A. Yes, sir.

Q. She was still forward? A. Yes, sir; still forward.

Q. But after you came forward and looked over the starboard rail, or looked over the bridge, you then saw them better, and saw the second one about a ship's length aft?

A. No, sir; I didn't notice that until after the collision; when I came on the bridge I was too busy to notice anything but the Plymothian.

Q. But after the collision you did look, and saw that the (252) vessels were still about a ship's length apart? A. Yes, sir.

Q. And one had gone by the stern of the Victory on down the river, but that the second schooner was abeam of the Victory? A. Yes, sir.

Q. But the second schooner was abeam of the Victory at the time of the collision? A. Yes, sir.

Q. And had not passed astern? A. No, sir; not then.

Q. And that schooner was then about 90 feet to the west of the Victory? A. Yes, sir.

Q. Which was then about 40 yards from the eastern line of the channel? A. Yes, sir.

By Mr. Floyd Hughes:

Q. Mr. Stewart, you have spoken of your steamer making stern way. Was that with reference to the tide? Was she she making stern way over the bottom or the flood tide? A. Flood tide, I should say.

Q. Then she was forging ahead over the ground? A. Yes, sir.

By Mr. Sharp:

Q. Much or little? A. Very little. After she got her stern way it depends upon the strength of the tide.

(253) Q. Very slightly, then? A. It will be very slightly in shore then.

Q. Did you see after the collision, and promptly after the collision, that the Plymothian's bow was close upon buoy number 7? A. At the time of the collision.

Q. Promptly afterwards? A. Yes, sir, very shortly afterwards. We wouldn't be over ten yards clear of the Plymothian when the buoy slipped around her bow.

Q. But you state at the time of the collision the Victory was 40 yards to the west of the line? A. Yes, sir.

Q. And at the time of the collision, the Plymothian's bow was right over the buoy? A. Yes, sir.

Q. Then she could only have gotten there by moving? A. Because the flood tide was drifting us up; her speed was checked. The Plymothian's engines were coming astern then.

Q. But notwithstanding the engines were going astern, then, she made some movement, and got over buoy number 7? A. Yes, sir.

Q. And then her movement was stopped, and afterwards you say you saw her run upon the beach? A. Yes, sir, on the eastern side.

Q. Was that close to buoy number 7? A. I couldn't say. It was on the east side of the channel

(254) STEPHEN ELCOATE, the next witness, being duly sworn, deposed as follows:

Examined by Mr. SHARP.

Q. What is your name, age, residence and occupation? A. Stephen Elcoate; 50; London; master mariner, master of the steamer Victory at present.

Q. Of what port? A. Of Newcastle-on-Tyne.

Q. What was your command on the 9th day of November, 1891, which was the day of the collision between the steamer Victory and the British steamer Plymothian, somewhere between Lambert's Point and Craney Island? A. I was master of the Victory, in charge on the bridge.

Q. In charge of her, on the bridge? A. Yes, sir.

Q. Which bridge? A. The pilot bridge.

Q. Is that the upper bridge? A. Yes, sir.

Q. Who are the owners of the Victory? A. Macintyre Brothers & Company.

Q. Who is their representative here? A. I am their representative here.

Q. And in possession of the steamer as master? A. Yes, sir.

Q. How long have you been her master? A. I have been her master—I superintended the building of her, and (255) have been master of her ever since she was built, in 1882. Been master ever since.

Q. What is her condition? A. I think it is very fair condition for a tramp steamer.

Q. What was her condition at the time of the collision? A. Very good before the collision.

Q. When was she last reported? A. She was surveyed last year.

Q. What time? A. I think it was in August.

Q. The year 1890? A. August, 1890.

Q. What surveyors? A. She went through Lloyd's. It would be number 2 of Lloyd's.

Q. Did they recommend any repairs at that time? A. They overhauled everything.

Q. The ship then was thoroughly overhauled? A. Thoroughly overhauled and painted.

Q. What did you say was her condition at the time of the collision? A. Good.

Q. What is your length? A. 324 keel, 338 over all.

Q. What is her breadth? A. 38.5, I think; I am not sure.

Q. What is her draft of water light? A. I think it was 17 feet aft and 13 forward.

(256) Q. You mean as she was on the 12th of November? A. Yes, sir.

Q. What ballast did she have? A. Water ballast.

Q. How much? A. 400 tons of water ballast and about 550 tons of coal on board.

Q. What is her tonnage? A. 1,774 net.

Q. Is she an iron ship? A. Yes, sir.

Q. Compartments? A. Seven compartments.

Q. Has she been in any previous collision from the time she was built? A. None whatever.

Q. All the time under your command? A. All the time under my command.

Q. What was the number of her officers and crew on the 12th day of November, 1891? A. 31.

Q. You were the master? A. Yes, sir.

Q. Who was the first officer? A. William C. Candlish.

Q. Second officer? A. James Stewart.

Q. Third officer? A. Henry Gilbert.

(257) Q. Who was her engineer? A. John Pattison.

Q. Second engineer? A. J. J. Crowell.

Q. Who was her third? A. Donald Munro.

Q. How many able seamen did she have? A. Eight A, B's.

Q. How many firemen? A. Nine firemen.

Q. Cook and steward? A. Yes, sir.

Q. Was that ship properly and sufficiently manned for sea voyages at that time? A. More so than any ordinary tramp across the Atlantic; better manned than seven-eighths of the ships.

Q. For what reason? A. Larger crew.

Q. Was it a good crew? A. Yes, sir.

Q. Good officers? A. Yes, sir.

Q. At what time did the Victory arrive at Hampton Roads on the 12th of November, 1891? A. Somewhere near 2 o'clock.

Q. From what point? A. From the Tyne—Newcastle-
(258) on-Tyne.

Q. Bound to Hampton Roads? A. Bound to Hampton Roads for orders.

Q. To take cargo here? A. Yes, sir.

Q. For what point? A. Liverpool.

Q. When will she sail for Liverpool? A. I expect she will sail in a day or two.

Q. With you on board as master? A. Yes, sir.

Q. With what laden? A. General cargo for Liverpool.

Q. On the day of the collision between the Victory and the Plymothian, November 12th, 1891, when did the Victory leave Hampton Roads and for what point? A. She left about 3:30, ship's time, for Norfolk.

Q. Is she now tight, staunch, and strong, and was she on the day of the collision before the collision? A. Yes, sir.

Q. On the day of the collision you hove anchor at what time? A. 3:30, ship's time.

Q. To proceed from Hampton Roads to Norfolk? A. Yes, sir.

Q. Just go on and describe the voyage from the heaving of the anchor up to Craney Island? A. Well, she was head to flood tide and she had to be swung around; the (259) engines had to be reversed about six or seven times backwards and forwards before she did get swung around, and then we proceeded on for the channel, the red buoy, and came up the channel to Craney Island, but on the road we passed one steamer deeply loaded, brown painted, bound out.

Q. Ocean steamer? A. Ocean steamer.

Q. Could you tell her nationality? A. British steamer.

Q. That was before you reached Hampton Roads? A. No; after we passed into the channel from Hampton Roads.

Q. From Hampton Roads to Craney Island? A. Yes, sir.

Q. On which hand? A. On our starboard side, and she gave us two whistles and we repeated them and passed starboard to starboard.

Q. Well, what was your speed at that time? A. I suppose about 9 knots.

Q. From the time you hove anchor until you reached Craney Island, what was about your speed? A. About 9 knots, as well as I could say.

Q. What do you call that, full speed or what? A. Yes, that is our full speed; as full as we have instructions to drive her at.

Q. Can she go ten? A. Yes, sir.

Q. But the full speed you are instructed to drive her is (260) 9 knots? A. Yes, sir.

Q. And you did go at that? A. Yes, sir, as near as we could.

Q. Coming on up did you pass any steamers? A. Yes, sir; the Louise, I think, was the first one.

Q. What did she do? A. She blew two whistles and we repeated and passed starboard to starboard.

Q. On which side of the channel were you? A. If we were starboard to starboard, we must have been on the east side.

Q. Where was that? A. That was on the northern side of Craney Island.

Q. What next? A. Next, when we were getting up to Craney Island we passed another boat.

Q. Below Craney Island? A. Just about as nigh abreast as I could say. She gave us two whistles and we replied with two.

Q. Did she pass starboard to starboard? A. Yes, sir.

Q. I want to put down there the side of the channel you were on? A. We were on the eastern side, she on the western.

Q. Coming up did you meet another? A. Yes; we met another, which gave us two whistles and we replied with two.

(261) And you passed her starboard to starboard? A. Yes, sir.

Q. You on the eastern side and he on the western side of the channel? A. Yes, sir.

Q. Now, sir, in passing those steamers that you have named, could you have passed on the western side of the channel without danger of collision? A. No, sir, we could not.

Q. They gave you the signals that you should take the eastern side of the channel? A. Yes, sir.

Q. You accepted their signals and took the eastern side? A. Yes, sir.

Q. And that prevented a collision? A. Yes, sir.

Q. Suppose you had taken the western side and they the western side, what would have happened? A. There would have been a collision.

Q. Did you meet any schooners, and if so, when and where? A. The first schoonor we passed was shortly after we passed Craney Island.

Q. Where was she? A. About mid-channel, or a little to the east of mid-channel.

Q. Did you and she signal? A. No.

Q. You kept which side? A. We passed up the eastern (262) side of the channel, and she passed to the west of us.

Q. And no accident happened there? A. No, sir.

Q. Have you any idea how far she was from the next schooner you passed? A. Yes, she was some distance below the next following schooner.

Q. By "some distance" you mean a good distance? A. Yes, sir, some distance.

Q. A good fair distance. Now describe your passing the second schooner. A. We passed the second schooner about 40 yards off.

Q. At that time how close was the Victory to the eastern line of the ship channel? A. Close over on the eastern side, with black buoys numbers 7 and 9 just as close in a line as they could be.

Q. As you looked ahead? A. Yes, sir.

Q. And you passing to the westward of the black buoy line. A. Yes, sir.

Q. About how many yards? A. I shouldn't say more than 40 yards.

Q. And this schooner— A. On the outside of us—to the west of us.

Q. About 40 yards? A. Yes, sir.

Q. How far was the third schooner from the second schooner as you saw them? A. The second schooner to

(263) the third schooner?

Q. Yes, sir? A. About a ship's length, as nigh as I could judge.

Q. The Victory, then passing the schooners, passed between the schooners and the eastern side of the river? A. Yes, sir.

Q. Proceeding up channel? A. Yes, sir.

Q. And at what speed at that time? A. I rang the telegraph slow at Craney Island.

Q. About what did that reduce the speed of the Victory from Craney Island? A. Well, she wouldn't lose her speed until she had been going awhile, and then I reckon she would go down to about 4 knots after she had been eased down a bit.

Q. Part of the time at a high rate? A. Yes, sir; because she wouldn't lose her way until she had been eased down a while.

Q. How long a time was taken to ease her down from the moment you ordered her to slow down until you got to 4 knots? A. She was slowed down about 6 minutes.

Q. From the time you ordered her to be slowed down? A. Yes, sir; she was running slow about that time.

Q. During all that time she was passing in the eastern part of the channel? A. In the eastern part of the channel.

(264) Q. And keeping in how many yards of the buoy line? A. About 40 yards along the shore.

Q. And keeping the schooners to the westward? A. The schooners were to the westward of us.

Q. Did you see the Plymothian; if so, when and where did you first see her? A. I saw the Plymothian about the

distance of three quarters of a mile, with her head steering down to the north on the west side of the channel; she had a red buoy about a length ahead of her, and she was coming down the west side of the channel until she closed this red buoy in out of my sight.

Q. Was she close to the buoy? A. Looking from the angle I saw her I couldn't very well say, but she was coming down the west side of the channel.

Q. You were able to see she was on the west side, but you couldn't tell how close she passed to that buoy? A. No, sir; she shut it out of my sight, coming down parallel to us on our starboard side about two points. That is when she was about three quarters of a mile off.

Q. Well, go on and describe her movement then? A. She came on, and I reported to the pilot. I said, "Pilot, that ship is porting her helm," and he blew the whistles. He blew two whistles, and I saw the Plymothian with steam coming from his pipe, and about 15 seconds after that I heard a faint sound, and I saw steam coming from his pipe. We replied; we gave him two whistles, and the pilot, when (265) I told him that this ship had ported her helm, he said, "Captain, I cannot port, I will run over that schooner."

Q. As to the whistles, you heard a faint sound, as if one whistle? A. As one whistle; I saw steam—first I saw steam, and about 15 seconds after I saw steam and heard a faint sound.

Q. What did that indicate to your mind at that time? A. It indicated that the whistles were two whistles. I saw the steam of one, and I saw the steam of one about 15 seconds afterwards, and heard the faint sound, which I took to be the Plymothian's whistle.

Q. How were you stationed at that time? A. I was on the bridge in command, on the lookout.

Q. To whom did you report? A. To the pilot.

Q. Who was specially directing the navigation? A. The pilot was directing——,

Q. The man at the wheel? A. Yes, sir.

Q. Who was the man at the wheel? A. Henry Gilbert.

Q. You three were on the bridge? A. Yes, sir.

Q. You in command of the ship? A Yes, sir.

(266) Q. What was the name of the pilot? A. Charles Nelson.

Q. And you were stationed as lookout and in command of the ship? A. Yes, sir.

Q. Under you, he was conducting the navigation? A. Yes, sir.

Q. And you reported to him? A. I was reporting to

him, the vessels that came in sight and the signals they gave.

Q. You were attending to this? A. Yes, sir.

Q. Who gave the orders to the man at the helm? A. The pilot.

Q. When you first saw the Plymothian you were about three quarters of a mile off? A. Yes, sir.

Q. How did the Victory move after you first saw the Plymothian? A. Kept a straight line up the channel on the eastern side.

Q. How far was she from buoy number 7 when you gave the first set of two whistles—how far was she from buoy number 7? A. The buoy would be about 5 lengths.

Q. Of the Victory? A. Of the Victory, yes, sir.

Q. Did you receive any signal in reply to these two whistles? A. Only what I have said already.

(267) What you said was in answer to these two whistles, you think? A. Yes, sir.

Q. How long a time elapsed before you gave any other signals? A. It was about half a minute, I suppose. A little more than half a minute we repeated the signals.

Q. It seemed, then, half a minute! A. Yes, sir.

Q. Then you gave her two more blasts? A. Yes, sir.

Q. Did she reply to that? A. I never heard it.

Q. Meantime what was the Victory doing up to that time? A. Shortly after giving the second blasts I reported that the ship had ported her helm.

Q. After the second blast. But I mean between the first and second blasts how was the Victory going? A. Going slow on the eastern shore.

Q. Towards buoy number 7? A. Yes, sir.

Q. And you reported to the pilot after you gave the second whistle and got no answer you say, that she was moving under port helm? A. Yes, sir; she didn't answer, but moved under port helm from the western to the eastern side of the channel.

Q. Previous to your reporting this, that the Plymothian (268) was moving under port helm, and after you first saw her, what was her movement? A. I do not understand your question.

Q. After you first saw her, I mean in the interval of time that elapsed between your first seeing her, up to the time she ported her helm, or appeared to port her helm, what movement was she making? A. She was coming down opposite to us two points on our starboard, on the western side of the channel.

Q. You moving south and he north; A. Yes, sir.

Q. And you say at the time you gave the first whistles

your boat was about 5 lengths from buoy number 7? A. Yes, sir.

Q. And your boat moved about a half a minute or more after the first set of whistles before you gave the second signals? A. Yes, sir.

Q. And you waited awhile to hear from them? A. Yes, sir.

Q. How long did you wait to hear before you said to the pilot— A. I reported to the pilot.

Q. After the second whistles, how long was it before you perceived she was moving under port helm? A. About half a minute; I reported to the pilot the ship was porting her helm.

(269) Q. You saw her then moving as under port helm? A. Yes. sir, from the western shore to the eastern shore.

Q. When you saw her—just as you saw her, the Plymothian began her movement as if under port helm from the west to the east shore, what did you do? A. We stopped our ship.

Q. Did you give her any signal then? A. Yes, sir, gave her three blasts, that we were going astern, and then she was rung full speed astern.

Q. At that time how far was the Victory to the north of the buoy? A. About three lengths.

Q. She was five lengths when you first saw the Plymothian? A. Yes, sir, when I first noticed the Plymothian heading down the west shore.

Q. But about three lengths off when you gave the order to go full speed astern? A. Yes, sir.

Q. You gave that order? A. I rang the telegraph myself.

Q. Did you receive any information at that time that the order was obeyed? A. Yes, sir, it was reported back from the engine room.

Q. How much time elapsed from your giving the order to go full speed astern up to the collision? A. I should think about four or five minutes.

Q. And when you gave the order the ship was then about three lengths to the north of buoy number 7? A.

(270) Yes, sir.

Q. And where did the collision occur? A. Just off buoy number 7.

Q. How did the buoy bear to the Victory at the time of the collision? A. The Plymothian hid the buoy from us, because she fouled it on her starboard bow.

Q. Then it was close upon buoy number 7 that the collision occurred? A. Yes, sir.

Q. Was the Victory to the north or south of the buoy

when the collision occurred? A. The Victory was to the north of the buoy.

Q. Did you give any order to the first engineer with reference to the backing? A. I saw him standing on deck, and I sung out to him and told him to rush down into the engine room and give her all he could. He was standing along on the bridge behind the pilot bridge, and I asked him if she was going full speed astern, and he rushed down below.

Q. You said, "give her all she can"? A. Yes, I said "go down and see she's going all she can," or something like that.

Q. Previous to saying that to the chief engineer who was not on duty——? A. I had given the order to the engineer on duty.

Q. Previous to giving that order to the first engineer had you received notice from the engine room that the or-
(271) der was obeyed? A. Yes, they reported back,

Q. You say she was going full speed astern from 4 to 5 minutes? A. Yes, sir.

Q. She commenced to do so when about three lengths north of buoy number 7, and the collision occurred near buoy number 7? A. Yes, sir.

Q. How was the Victory heading and canting shortly before the collision? A. When the engines were stopped, the helm was amidships, and her head commenced to cant a little to port. The tide had got hold of her quarter and caused her head to cant to port a little when she was stopped.

Q. Was that canting to port due to any extent to the position or movement of any schooner—canting in to port, I mean? A. No, no. A short while before that we had starboarded a little for a schooner, and then steadied our wheel again, and when the engines were stopped, the tide got a little on one side, and canted her head in to port,

Q. What tide? A. Flood-tide.

Q. Would that be the effect of the flood-tide? A. Yes, sir; if the tide catches her on either quarter when the engines are stopped it is bound to cause her head to throw over.

(272) Q. The tide got the ship, then, on the quarter? A. The tide took the ship on the port quarter and canted her head in to port.

Q. And previously to that time, the ship had been a little starboarded and afterwards steadied because of the proximity of one of the schooners? A. Yes, sir.

Q. But the cause of the canting a little to port was that the tide got her on the quarter? A. Yes, sir, the tide got her on the quarter.

Q. And what was done to correct that? A. The engines were put full speed astern, and after the engines had been going two or three minutes, the pilot ordered the helm to starboard to straighten her head up with the channel.

Q. And was that done? A. That was done.

Q. You know that was done? A. I know that was done, because I saw it done.

Q. Were you in communication with the pilot and wheelsman? A. Yes, sir; the pilot was standing within two or three feet of me.

Q. All standing together? A. Not all standing together.

Q. Was the pilot-house on the bridge? A. Yes, sir, and the pilot was standing behind the man, giving orders, and I was to one side.

Q. And you know the helm was starboarded at that time? (273) A. The helm was starboarded when she was going astern about two minutes—when she was beginning to lose headway.

Q. Then, after that, her head began to cant to starboard? A. After the engines had been going astern some she began to straighten herself in the channel.

Q. You have stated that the Victory was about three ships' lengths to the north of buoy number 7 when you began to reverse the engines? A. Yes, sir.

Q. And at the time that you saw the Plymothian on the western side of the channel? A. Yes, sir.

Q. And change her movement under port helm? A. Yes, sir.

Q. Now describe her movement from that time on, under port helm? A. She came across under port helm, first heading to north north-east, until she began to get towards within two lengths of us, coming around under port helm all the time, and then she began to come quicker to port.

Q. Heading how? A. Heading to the east—to the north-east.

Q. Did she head that way, or how, at the time of the collision? A. Heading about north-east, as near as I can say.

Q. The Victory heading how? A. For Lambert's Point (274) pier—to the south, south-east.

Q. At the end of it? A. Yes, sir; the light-house was just about ahead of us, about near south, south-east, I don't know exactly. The light-house at the end of the pier was right ahead of us.

Q. About south, south-east? A. Yes, sir; as far as I could judge.

Q. You did not look at the compass? A. No, I did not.

Q. But from your recollection of the channel, that would be the bearing of the light at Lambert's Point? A. Yes, sir.

Q. But those were not compass points, either as to the Plymothian or the Victory? A. No, sir.

Q. When you saw the Plymothian change her movement and come over from the west side, did she come over to the east of the channel? A. Yes, sir.

Q. Did she come up to the Victory? A. Yes, sir; across the Victory's bow. She crossed from the west side of the channel

Q. First heading N. N. E.? A. First heading about north.

Q. But from the time she changed her helm? A. First she was heading north and then N. N. E.

Q. But was she heading N. N. E. at any time until she (275) commenced to port her helm? A. No, sir.

Q. From the time you first saw her until she changed her course she was heading about north? A. Yes, sir.

Q. On the western side? A. Yes, sir.

Q. And when you observed the change of movement from the west side of the channel over to where the Victory was she was heading about N. N. E. principally, but when she was within two lengths of the Victory she swung around to N. E. under port helm? A. Yes, sir.

Q. And then crossed the bows of the Victory? A. Yes, sir.

Q. How did she strike the Victory? A. Under the influence of her port helm he port side fell on to us, and the speed she had got across the channel she fell on our stem, damaging our starboard bow.

Q. Was it the stem of the Victory that inflicted the wound on the Plymothian? A. Yes, sir; it was where the Plymothian fell on the Victory's stem.

Q. Did you see her strike against the Victory's stem? A. No, sir; I couldn't see it from the bridge, I could only see the angle the ships lay at.

Q. From the bridge what would be the angle apparent to you? A. On the bridge, on the starboard side, the way the ships lay it was an obtuse angle, but on the port side it was (276) an acute angle.

Q. From the position you were standing it was— A. From standing amidships, where I was then, on the starboard side it was an obtuse angle, but on the port side it was an acute angle, which is the complement of the obtuse angle. The angle on the port side of the Victory was an acute angle, and the angle on the starboard ride of the Victory was an obtuse angle.

Q. The acute angle was towards the Victory and the obtuse angle was towards the Plymothian? A. Yes, sir.

Q. The acute angle was towards you? A. Yes, sir.

Q. Now, suppose you had been standing on the forecastle

head and looking beyond the intersection of the line, what would the angle be? A. It would be different. It would be different from my position say 150 feet; it would be from the ship's bow 150 feet to the bridge.

Q. The further angle, then, would be the obtuse angle? A. Yes, sir.

Q. And the nearer angle be the acute angle? A. Yes, sir.

Q. Did the Plymothian check her speed at any time during her movement from the western line of the channel up to the point of the collision? A. Yes, sir; about to the best of my knowledge he reversed his engines when he was (277) about a length from us on our starboard bow.

Q. What effect did that have upon his speed? A. It couldn't have but very little effect, because he crossed our bows at 3 or 4 knots, but it would help to heave him against our stern more heavily.

Q. But it would tend so make the Plymothian strike more heavily the stem of the Victory? A. Yes, sir.

Q. Do I understand you to say that while she was moving that ship's length of the Victory towards the Victory, that her speed was much diminished? A. Not much, sir, it couldn't be.

Q. What do you judge was her speed in crossing the channel before she reversed her engines? A. She was coming about four knots—from three to four knots.

Q. And what do you judge the speed at the time of the striking? A. About the same. The time her engines were rung astern she hadn't time to take the way off.

Q. And how much would it reduce it in your judgment? A. Very little.

Q. But the reversing of the engines would throw her more heavily against the stem of the Victory? A. Yes, sir, the position she got in.

Q. Did the collision stop entirely the speed of the boats? A. No, she went right across our bows on to number 7 buoy.

(278) Q. And fouled that buoy? A. She fouled that buoy; ran it out of sight from my position on the bridge.

Q. The Victory was at that time how far to the west of that buoy? A. About 40 yards, as nigh as I could say.

Q. So that after the collision she ran past the Victory, across her bows and fouled that buoy 40 yards to the east of where the Victory was when striking her? A. Yes, sir.

Was the Victory pushed towards the buoy by the collision? A. No, sir.

Q. She ran by her? A. We couldn't run by the buoy; we couldn't because this ship was across our bows.

Q. And the Victory was moving forward, or backward? A. Going astern.

Q. Then immediately after the collision the Victory continued moving astern? A. Yes, sir.

Q. And was not pushed towards the eastern shore? A. She went astern along the channel line. The engines being reversed and the helm a-starboard brought her straight in the channel line.

Q. Bnt the Plymothian went further to the eastward across the bows of the Victory and actually fouled with the (279) buoy number 7? A. She fouled buoy number 7.

Q. But after that did you see her check her speed? A. Yes, sir; afterwards she backed astern, and the buoy came right around her nose.

Q. How long after she struck the buoy before she commenced to move back? A. I didn't take any notice of the time.

Q. A short time? A. I should say about three minutes.

Q. You couldn't tell the time, but judge about three minutes after? A. Yes, sir.

Q. Did you afterwards see her run for the beach and go by the buoy? A. Yes, sir.

Q. Then she rung up, I suppose? A. She rang up and ran on the eastern shore.

Q. Did the Victory at any time after running to the south of Craney Island move in the middle of the ship channel? A. No, always on the eastern side.

Q. Never left the eastern side? A. She couldn't.

Q. State why not? A. The steamers and sailing ships passing down, couldn't without colliding with other ships.

Q. I understand, then, that the taking position on the (280) eastern line of that channel was not a voluntary act—that signals were given you to do it? A. Yes, sir; and we had to keep that side of the channel all the time.

Q. Well, any time from the moment you hove anchor in Hampton Roads up to Craney Island, did you hear any whistles ahead from the Plymothian or any vessels in that direction? A. I did not notice.

Q. From the time you hove anchor until you got to Craney Island did you hear any whistles of any kind—I do not mean from the steamers on your starboard side—but did you hear any whistles from Lambert's Point while you were near Craney Island? A. No.

Q. From the Plymothian or any vessel towards Lambert's Point? A. Heard a locomotive on the pier, but the sound came from the port side.

Q. Did any whistles come from the starboard side? A. Only what I have stated.

Q. You have told all the whistles you heard? A. Yes, sir.

Q. Then you got no whistles of any kind from the Plymothian or any vessel in that direction previous to your giving your whistles? A. Only the faint blast I spoke of.

Q. But you have stated that was after you sounded your first signals? A. Yes, sir.

(281) Q. Now I repeat the question. Did you, previous to the sounding of your whistles, two whistles, did you receive any whistles from the Plymothian or any other vessel to the south of you? A. None except the river steamers passing down channel and this one tramp to the north of Craney Island.

Q. She was not to the south. The question relates to whether you received any whistles from any vessel at Lambert's Point? A. No, sir,

Q. Neither the Plymothian or any vessel near the Plymothian giving any signal before you gave yours? A. No other signal was given to her. We never heard a sound from her.

Q. Get any response to one from her? A. No, sir.

Q. Is it true that the Victory had at any time starboarded her helm to pass across the bows of the Plymothian? A. Not at any time; it was impossible.

Q. Is it true she star-boarded her helm to pass over the middle line of the channel? A. She couldn't do it. She was on the eastern side of the channel, and if she starboarded her helm she would be ashore.

Q. Have you examined the Victory since the collision occurred to see how she is wounded? A. Yes, sir.

(282) Q. Describe it. A. She got four plates stove in on the starboard side from about the ten-foot mark.

Q. Near where? A. Near the stem.

Q. Abaft the stem? A. Yes, sir; four plates damaged and stove in, and she's got four on the port side.

Q. How did she get wounded on the port side as well as the starboard side? A When the Plymothian's plates was driven in the starboard side it was driven out of the port side and got wedged in. It came in on the starboard bow and went out of the port bow.

Q. How long was it? A. It was from 4 to 5 feet.

Q. One of the iron plates? A. Of the Plymothian with the butt straps on?

Q. With the butt straps on? A. Yes, sir.

Q. How wide? A. Perhaps two feet wide; I am not certain; I never measured it. I saw it, but didn't take much notice of it.

Q. Struck the starboard? A. Went through the plates

on the starboard bow and then came out of the port side of the Victory.

Q. Went through the ship at that point? A. Yes, sir.

(283) Q. From the starboard to the port of the Victory? A. Yes, sir.

Q. And that wound was how many feet abaft the stem? A. Close abaft the stem.

Q. Could that injury have been inflicted if the Victory had been the moving vessel and if the Plymothian had not been moving? A. Impossible.

Q. Why? A. The plate, when she fell against our stem, went in through our starboard bow and came out through our port bow. Now, unless the Plymothian had a lot of way on her, it would never have broken that plate off and left it in our bows. She crossed our bows. If she had gone the other way—

Q. What other way do you mean? A. If she had gone astern it would have drawn out, but as the crossed our bows at a great rate this plate was driven into the starboard side, got wedged in there, and broke off with the speed she had across our stem.

Q. Just describe the way it went in the Victory? A. The Plymothian's broadside fell down on the Victory's stem and burst her plates in. One of the broken plates went through the starboard bow of the Victory, going behind the frames, breaking two frames, and going through the port bow, and the rate of speed she had crossing the Victory's bows broke the plate off and left it in the Victory's bows.

(284) Q. You spoke of the Plymothian's speed in going across the Victory's bows. To what point on the river? A. To buoy number 7.

Q. Then it is your judgment that the speed of the Plymothian, in going across the Victory's bows and continuing on after the collision to buoy number 7, that it was that which drove her along, breaking the plate into the starboard bow of the Victory, and through the bows and out of the port bow? A. Yes, sir.

Q. Could that have been done unless the Plymothian had been moving after the collision with some speed? A. She must have been moving with some speed to have done it.

Q. After the collision? A. After the collision; yes, sir.

Q. Suppose the Victory had been the moving boat, and the Plymothian had stopped, could that plate have been driven through the starboard bow of the Victory and passed out the port bow? A. It is impossible.

Q. About the extent of the damage, are you prepared with a statement of the damage in money sustained by the

owners of the Victory by reason of this collision? A. I have not got it. I—

Q. Who has charge of it here? A. Mr. Haughton.

Q. Agent of what? A. The North American Transporta-
(285) tion Company.

Q. Will be supply that evidence? A. Yes, sir.

Q. How many days were lost by the Victory by this collision? A. Eleven days. I paid eleven days wharfage.

Q. What is the demurrage of the Victory? A. Sixpence a ton is demurrage in America.

Q. Has the Victory been fully repaired at this port? A. No, sir; she has been temporarily repaired.

Q. Where will she be afterwards repaired? A. In Liverpool—in England.

Q. Will you undertake to send over the repair-bills in England for use in court? A. Yes, sir.

Q. Until the Victory is fully repaird in Liverpool, is it possible to get the amount of the damage sustained? A. No, sir.

Q. That will be obtainable? A. After she is fully repaired.

Q. On which side of the ship were you stationed as lookout? A. The middle of the starboard side of the mid-ships on the pilot bridge.

Q. You could see both sides? A. Yes, sir, could see both sides.

Q. On which side would you look to see Lambert's Point? A. On the port side.

Q. And on which side to see the Plymothian if she came
(286) from the western side of the river? A. On the starboard side.

Q. Did you look over to starboard to see her when she was crossing the channel? A. Yes, sir; I saw her.

Q. Could you have seen her crossing the channel by looking over the port side? A. Impossible.

Counsel for the Victory here offer Joseph Wood, fireman, and James Marwick, carpenter, as witnesses for croas-examination for the Plymothian, and they were declined. They are offered because they saw the collision.

Adjourned at 2:30 P. M. until 4 P M.

Reassembled at 4 P. M., the examination in chief of Captain Elcoate being continued.

By Mr. SHARP:

Q. Specify the spot where the collision occurred, and describe the bearing of each of the steamers towards buoy 7

at the time of the collision. A. I couldn't say, because I couldn't see the buoy across the bow of the Plymothian.

Q. Was it to the north of the buoy? A. Both of us at the time of actual collision.

Q. One came from the south and one from the north? A. Yes, sir. We came from the north and he from the south.

Q. The collision occured at the buoy? A. Yes, sir.

(287) Q. And if anything the Plymothian would be rather to the south of the buoy, and the Victory to the north of the buoy? A. No, the Plymothian was right on the buoy. When she backed astern, the buoy came around her stem; when it was on the other side we couldn't see it.

Q. How far to the westward of the buoy was the Victory at the time of the collision? A. About 40 yards.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. How far from the mouth of the Elizabeth river was it when you passed the English steamer? A. About a mile, sir—that is in the line of red buoys. I don't know whether you know the channel.

Q. From Hampton Roads on in the narrow channel——? A. Is marked by red buoys on one side and black on the other.

Q. And you passed the English steamer about a mile ——? A. Yes, sir, from the entrance of the channel as marked by the buoys.

Q. On which side of the channel had you been proceeding before you met this steamer? A. We were coming up about mid-channel.

Q. You passed this steamer starboard to starboard? A. Starboard to starboard. He blew the first two whistles.

Q. Do you know the name of that steamer? A. No, sir,

(288) I can get it for you.

Q. How far was it after you passed this steamer before you passed the first river steamer? A. Didn't meet the river steamer—the first river steamer Louise—until we got close to Craney Island.

Q. How far? A. About half a mile.

Q. How far were those steamers apart? A. The first one and the Louise?

Q. How far from the English steamer was the Louise? A. I suppose about three miles.

Q. And you had continued on the eastern side of the channel from passing the English steamer to meeting the Louise, had you? A. We kept in the centre of the channel

when the channel was free, but when we approached the Louise (that is the first steamer we met, the Newport News boat) she gave us two whistles and we repeated them.

Q. How was she with respect to the channel when those two whistles were sounded? A. She was well over towards the middle of the channel.

Q. How far distant was she when she gave you the signals? A. Oh; she was about under a quarter of a mile.

Q. Then the next steamer, how did you pass her, and where? A. Passed her starboard to starboard just between Craney Island and number 7 buoy; just off Craney Island. I didn't take that particular notice.

(289) And how far was she from the last? A. She was some lengths ahead of the last.

Q. And what was the name of that steamer? A. I don't know.

Q. Did you pass any other steamers? A. Yes, we passed a third steamer.

Q. Where was she? A. Between Craney Island and buoy number 7.

Q. And how far behind the second steamer? A. She was a good fair distance.

Q. Such as what? A. Well, I don'—just signalling distance I call it. She gave us two whistles, and we replied to them.

Q. Was it over a quarter of a mile or a half a mile? A. I suppose it would be about a quarter of a mile.

Q. Now, how far behind this last steamer was the first schooner? A. The first schooner and the last steamer were pretty close together, only the steamer was to the western side and the schooner was in the mid-channel.

Q. What distance apart, then, were the ships across the channel, and not to the north and south? A. The steamer was to the west of the channel and the schooner in the middle of the channel, more to the east if anything.

Q. As I say, the distance was more across the channel than north and south? A. Yes, sir.

(290) Q. You have stated that the first and second schooners were some little distance apart; can you give that distance? A. Now, look here, sir, there have been three schooners mentioned, do you mean the first and second from the north or south?

A. I mean between the first schooner you passed and the second? A. Going to the north?

Q. How far was the second schooner you passed from the first schooner you passed? A. I suppose about a couple of lengths, the first schooner from the second schooner.

Q. Upwards of 600 feet, then? A. Yes, sir.

Q. How was she with respect to the channel? A. About mid-channel, a little to the east if anything; the steamer was inside of them.

Q. Towards Craney Island? A. The river steamer was to the west of the schooners.

Q. How wide is the channel there, Captain; say the 20 or 21 foot channel? A. Oh! about 320 yards, I think; it may be a little more or a little less.

Q. Opposite what vessel were you when you sounded the first whistle to the Plymothian? A. Opposite which vessel?

(291) Q. Yes, sir? A. The first whistles were sounded just off the first schooner we met, as nigh as I could judge.

Q. The second whistles? A. Was sounded about a minute afterwards.

Q. And off what vessel? A. We want off any; we was coming up to the second schooner.

Q. She was then on your starboard bow, the second schooner? A. Yes, sir.

Q. And how far distant? A. She was about a ship's length.

Q. How many points on the starboard bow? A. She would be a very little on our starboard bow; we had to starboard the helm a little for her.

Q. Almost dead ahead of you, then? A. Not dead ahead, but we couldn't run along a straight course—we had to starboard a little.

Q. So near a straight course you had to starboard a little? A. Yes, had to starboard a little.

Q. Where was the second schooner when your three blasts were given and your engines ordered back? A. She had passed astern.

Q. Can you estimate the distance between ths second and third schooner? A. They were about a ship's length apart, as nigh as I could judge.

Q. Those schooners were proceeding very slowly down (292) the river? A. Yes, sir; with a southwest wind and the tide against them, they didn't move very fast.

Q. Who was in command of your vessel. A. I was.

A. And in the capacity of master? A. In the capacity of master.

Q. With a Virginia pilot on the bridge? A. With a Virginia pilot navigating the vessel.

Q. To whom you reported in capacity of lookout? A. Yes, sir.

Q. And when you make oath in your libel that "during the voyage the master and a licensed Virginia pilot were in command, and there was a lookout properly stationed," you

have reference to yourself? A. Yes, sir; I was the lookout.

Q. So that in that sentence the word "master" and the word "lookout" refer to one and the same person? A. Yes, sir.

Q. Is your recollection of the events of this collision more clear now than when this libel was sworn to two days after the collision? A. Well, they are pretty clear.

Q. You think you have as clear a recollection of the events now as then? A. Yes, sir; just as if I saw them right straight off.

Q. And your statement of to-day can be as fully relied on (293) as at the time you made oath to that libel? A. Yes, sir.

Q. Did you see the Plymothian leave her pier? A. No, sir.

Q. The first time you saw her, then, was about the time you were passing the last of the schooners, and she was on the western side of the channel? A. She was on the western side of the channel.

Q. And promptly thereafter you gave her your first signals? A. Yes, sir.

Q. How did you judge her position with reference to the channel? A. By the line of the buoy, by Lambert's Point—could see both the red buoys and the black buoys, and could see Lambert's Point for a mark.

Q. You had a full view of the whole thing? A. Full view of the whole thing.

Q. And you are positive she was on the western side of the channel? A. I am as certain as I sit here.

Q. And how close to the line of red buoys? A. She was pretty close over. Of course us being on the eastern side, I couldn't tell how close she was.

Q. How many red buoys did you see, and how close was she to the line of those buoys? A. I have already answered that question I think, sir. I said I couldn't tell how close she was to the buoy. I said she looked far over on the western side close to the buoy.

(294) Q. You said you could tell the width of the channel by the line of the buoys—how many red buoys did you see? A. There is one red buoy there at that particular spot. That was ahead of us.

Q. Only one red buoy ahead of you? A. Yes, sir.

Q. And you couldn't estimate the distance the Plymothian was from that red buoy? A. No, sir, but she looked to be close.

Q. Did you sound those two signals before or after you observed her moving under port helm? A. The signals were sounded before she moved under port helm.

Q. She was about three-quarters of a mile off I think you stated? A. Yes, sir, when we first saw her. What I stated was, we were about five lengths from the black buoy number 7 coming up on the east shore when the first whistles were blown. In half a minute or a little more the second whistles were repeated, and we didn't blow the danger signal until she made the port movement to move from the west side of the channel to the east side of the channel.

Q. So the movement under her port helm from the west side to the east side was not made until you had sounded your second whistles? A. Yes, sir.

(295) Q. And immediately thereafter you sounded your danger signals? A. Yes, sir; when she made the port movement.

Q. You stated that immediately after you sounded your first whistles you saw steam and water come from the Plymothian's whistles? A. Yes, sir, I did.

Q. Abont 15 seconds thereafter you saw steam again issue from that whistle? A. Accompanied with some faint sound; an indistinct whistle it was, which I took to be the two whistles.

Q. You took those whistles, sounded at intervals 15 seconds apart, to be an answer to your first set of two whistles? A. Yes, sir.

Q. Did you hear any other whistles at any time from the Plymothian? A. Well, when she was about a length and a half from us, I suppose, I heard him making a sound on his whistles, but I couldn't tell whether there was one, two, or half a dozen. They were pulling away at the string and there was nothing but steam and water coming out.

Q. Just before the collision, then, you did see the string being pulled and steam issuing from the whistle? A. Yes, sir; steam and water.

Q. Did you hear any sound? A. Yes, sir; I heard a faint sound. Wherever there is a rush of steam and water

(296) it makes a sound

Q. You don't feel authorized to call it a clear and distinct whistle? A. No, sir; it was not.

Q. You construed that to be the danger signals? A. Yes, sir; it was meant for the danger signals.

Q. And you distinctly saw the steam issuing from the whistles? A. Yes, sir, steam and water. I saw the man pull it myself.

Q. Who was pulling the string, the master or the pilot, could you distinguish? A. I couldn't tell you. The master and the pilot resemble one another, and in the distance you couldn't make out one from the other.

Q. At the time you passed the second schooner you saw

the third schooner, say, about a ship's length off; how did she bear, then, from you? A. She was on our starboard bow; a little on our starboard bow. We had to starboard.

Q. You had to starboard? A. No, we did not have to starboard for her; I mistook your question.

Q. I understand you gave no signals whatever to the schooners as you passed? A. None whatever.

Q. And that you waited, in passing the steamers, for the first signal to be sounded from them and then adopted (297) them? A. They sounded the first signals.

Q. And you have stated that after you passed the second schooner your helm was steadied, and when your engines were stopped the tide took your ship on the port quarter and canted her head a little to port; how much to port? A. How much did our head cant to port from the line of mid-channel? About two points as nigh as I can judge, maybe a little more.

Q. And that movement was due, not to any action of your helm, but from the effect of the tide? A. The effect of the tide, the ship being much deeper aft.

Q. And that when your headway was checked your pilot put your helm to starboard? A. Yes, sir, the helm was put to starboard after the engines had been reversed some time, which caused her te straighten up in the channel.

Q. She was then, and so continued until the collision? A. Yes, sir.

Q. Heading straight up the ship channel? A. At the time of the collision she was heading for the light-house on Lambert's Point.

Q. And immediately before the collision her helm had been placed to starboard when commencing this cant to port? A. Yes, sir, with the engines going full speed astern.

Q. And she, under the effect of that starboard helm, with the engines reversed, had headed up the main ship chan- (298) nel? A. It brought her head towards the main channel.

Q. You are positive that your headway was entirely checked at the time of the collision? A. Yes, sir.

Q. How did you judge that? A. By the wash going along up the ship's side and the bearings ashore.

Q. And at that time you had in view the back-wash, the bearings ashore, the steamer ahead, the third schooner abeam and the second schooner behind you, did you? A. Yes, sir, that is the position.

Examined by Mr. MYNDERSE:

Q. Captain when you first met this tramp steamer, the

brown painted one, did you have to change your helm when you passed her? A. A little, sir; he gave us the first two blasts. He was holding the western side of the channel and we were about the middle.

Q. Why had you given up the western side of the channel? A. We entered the channel about the middle.

Q. Why didn't you go up the western side? A. There was nothing in the way down there when we entered the channel.

Q. And after you passed the brown painted steamer there was nothing in the way of your taking the western (299) side of the channel? A. There were some big boats coming down.

Q. Was there any tug boats in the way of your taking the western side of the channel? A. Yes, sir, the Pocahontas was on the western side, going to Newport News.

Q. After your passing the Pocahontas there was nothing to prevent your taking the western side of the channel? A. If you have noticed the channel, we can't steer straight up the channel.

Q. Did you ever make an effort to get on the western side of the channel? A. We were on the middle of the channel, and when those steamers came down they gave us two whistles and made us go to the eastward.

Q. Did you make an effort to get to the western side? A. We were in the middle until the ships gave us the signals.

Q. And you never proposed to go the other way? A. No, sir, because they gave the signals first.

Q. There were times before you met the tramp, and after you met her, when you were not under any signal from any steamer? A. Yes, sir, we were in the middle of the channel.

Q. Why did not you take the western side of the channel, then? A. We don't want to go to the western side of the channel when the channel is free—we have got the whole channel free.

(300) You have been in Norfolk before? A. Been running here ever since these last five years.

Q. You had in mind the width of the channel there—A. Yes, sir; and I have oftener passed down the port side than the starboard side.

Q. Don't commence on your defence. When you do that you sound as if you were guilty. You said you knew you were entering into the channel, of which you knew the width? A. Yes, sir.

Q. And you knew that channel was a long course to Norfolk—several miles? A. Yes, sir.

Q. And you are acquainted, I suppose, with the rule of the road, that in rivers and narrow channels the vessel bound down shall go to the right, and the vessel bound up shall go to the right? A. Yes, sir, where practicable.

Q. You made no effort on that occasion to go to the right? A. We kept in the mid-channel when the mid-channel was clear.

Q. You never invited those vessels to go to the right? A. No, sir; they signalled first.

Q. You had a larger and stronger whistle; why didn't you blow the whistles first? A. The whistles of American steamers are generally loud-toned whistles, and they generally blow first.

(301) Q. Is that the reason you did not blow first? A. No, the pilot gave his own whistles.

Q. Who did blow the whistles on your vessel? A. Pilot, sir.

Q. Did you make any suggestions to him that he should keep over to the right? A. Not one.

Q. Didn't it occur to you to suggest to him that it would be better to go up on the right hand side of the channel? A. No, sir; I did not.

Q. And in each instance of meeting all those vessels your vessel waited until they blew? A. They blew the first whistles.

Q. Did you have to change your helm for any of those three river steamers? A. No, sir.

Q. And they did not have to alter their's apparently? A. No, sir.

Q. You were at that time so far on the eastern side of the channel— A. Not all the time, not until we got up to Craney Island.

Q. But when you met those river steamers you were so far on the eastern side of the channel? A. No, sir; we were on the middle of the channel, as near as we could get. They came down the western side.

Q. You were so far to the east of them that you passed (302) without changing your helm? A. Yes, sir.

Q. How far was it between the third of those river steamers and the first schooner you came to? A. The third river steamer was about between the first and second schooners.

Q. When this first signal of two blasts was blown on your vessel, was that blown to the Plymothian? A. Yes, sir.

Q. Who blew it? A. The pilot, sir.

Q. Did you have any talk with him before he blew it? A. No, sir.

Q. Did he speak to you? A. No, sir; I reported a steamer on the starboard bow.

Q. And he thereupon blew? A. He blew two whistles.

Q. Was there any conversation between you and him before that was done? A. No, sir.

Q. Did you object in any way to his doing it. A. No, sir.

Q. What were the first words that passed between you and the pilot, spoken by either one of you, respecting your relations with the Plymothian? A. When we blew the two whistles I reported to the pilot that the Plymothian commenced to cross the channel, and he says, "Captain, I can't port; I will run over that schooner."

(303) Q. Then what was done? A. The engines were stopped and reversed full speed astern.

Q. Who stopped them? A. I did, sir; I rang the bell.

Q. Did you have any word with the pilot about stopping and reversing? A. He sung out to stop. He gave the order.

Q. He gave the order? A. He gave the order.

Q. Did you approve of this navigation of the pilot's? A. Yes, sir, I did.

Q. Made no objection to it? A. I made no objection to him.

Q. And what distance did you say the Plymothian was from you at the time the first signal was blown? A. I suppose under half a mile; between a quarter and a half a mile.

Q. When the first signal of two blasts was blown? A. Yes, sir, about a quarter; nearer a quarter.

Q. About a quarter of a mile? A. Yes, sir.

Q. You had not noticed her until she was within a quarter of a mile of you? A. I saw her on the starboard side of the channel between a quarter and a half a mile.

Q. What distance did you say the Plymothian was from you when you first saw her? A. Before any whistles were

(304) blown?

Q. Before any whistles—when you first saw her? A. I suppose when I first saw her she was about three-quarters of a mile.

Q. And you reported at once to the pilot? A. I reported at once to the pilot. I reported everything that passed up and down to the pilot.

Q. But nothing was done on board your vessel about signalling her until you got within a quarter to half a mile? A. Yes, sir; a quarter to half a mile.

Q. Was there any conversation between you and the pilot respecting the Plymothian after you first reported her at a distance of three-quarters of a mile and the time this first signal of two whistles were blown? A. No, sir; I have already told you what conversation we had.

Q. He waited, then, after getting the report of the Plymothian, some considerable time before the whistles were blown? A. Yes, some little time.

Q. So you had time to approach each other from a quarter to a half a mile? A. Yes, sir.

Q. Your helm was still amidships when you blew that first signal of two blasts? A. Yes, sir.

Q. And continued amidships up to after you had blown (305) your second signal of two blasts? A. Yes, sir.

Q. And continued amidships until after you had blown the danger signal of three blasts? A. Yes, sir; steering up in a straight line.

Q. You are aware of the rule of the road that a signal of two blasts means you are directing your course to port? A. Yes, sir.

Q. You were not directing your course to port at that time, were you? A. We were going steady along, sir.

Q. You heard, as you say, a faint sound from the Plymothian after the time you blew your first signal of two blasts? A. I told you, sir, that I saw steam coming from the pipe, and afterwards saw the steam from which the faint sound came.

Q. As I understand it, you saw two puffs of steam? A. Yes, sir.

Q. About 15 seconds apart? A. Yes, sir.

Q. That would be too far apart to be the same signal? A. Wasn't the same signal.

Q. If anything, it was two signals of one blast each? A. Yes, sir; that is what I took it to be.

Q. You took it to be two signals of one blast each? A. Yes, sir.

Q. And you know the rule of the road that a signal of (306) one blast means she is directing her course to starboard? A. Yes, sir.

Q. And after a time you saw she was actually directing her course to starboard? A. Yes, sir.

Q. Are you a part owner of this steamer? A. No, sir.

Q. Have no shares in her? A. No shares.

Q. Now, captain, when you got those signals from the Plymothian, which you understood to be two signals of one blast each, why did you reply with a signal of two blasts? A. Because it was proper sir; we blew two whistles, and what I made out was his reply, was two whistles.

Q. Two signals of one blast each? A. Yes, sir.

Q. And that indicated that there was some disagreement or misunderstanding between you? A. No, sir; I understood from seeing the steam come from his pipe that he blew two whistles, and we repeated again by two whistles.

Q. Don't you think you were called upon at once to reverse on getting those signals from him? A. We did reverse.

Q. I mean at once, before blowing your second signal of (307) two blasts? A. As we heard no more and saw him directing his course to the eastern side of the channel, we put our engines full speed astern.

Q. Now I want to be entirely fair with you—why did you not do that earlier? A. I didn't think it necessary. The ship was coming down the channel in the opposite direction to us, she on the west and we on the east side. She had any amount of room to pass down the west shore as we had to pass down the east shore.

Q. That is all the reason you have? A. That is all the reason, sir.

Q. You have estimated the heading of the Plymothian at the time of the collision as northeast? A. Yes, sir.

Q. You think her heading when you first saw her was north? A. Yes, sir.

Q. And later noticed her N. N. E., and at the time of the collision it was N. E.? A. Yes, sir.

Q. Q. And what do you judge was the heading of your steamer at the moment of the collision? A. She was heading right to Lambert's Point—about S. S. E., as nigh as I could make it.

Q. So that in this acute angle you have been speaking of as existing between your port side and the side of the Plymothian was about 6 points? A. No, sir.

(308) And in the obtuse angle on the other side, that is, your starboard side was about ten points? A. Yes, sir.

Q. Have you your log-book, captain? A. Yes, sir, it is here.

Q. I would like to look at it?

Witness here produces log-book, a copy of the entries of the 12th of November being attached to the record, marked exhibit "C."

Q. Who writes that log, Captain? A. The chief officer.

Q. When was this written up? A. I don't know, sir, I had it up in Norfolk when I drew the libel.

Q. When you drew your libel against the Plymothian? A. Yes, sir.

Q. That was filed a couple of days after the collision? A. Yes, air, I think it was Friday I brought it up here.

Q. The collision occurred Thursday, and it was written up sometime before you brought the log up on Friday? A. Yes, sir.

Q. Did you and the mate confer together before this was written? A. I didn't confer with him at all, sir, he wrote it up.

Q. You have read it? A. I have read it over some days ago.

(309) Q. Well, have you any fault to find with it? A. Not the least, sir.

Q. Strikes you as being a correct account of the collision? A. Yes, sir, to the best of my knowledge.

Q. And of the navigation of the vessel? A. Yes, sir. Press copies were taken from that and sent to England.

Q. Sent to your owners? Yes, sir; I can give you a copy.

Q. How long were your two vessels in collision? A. A very short time.

Q. Well, how long before you separated? A. She went right across our bows, sir; she never stopped. She had a way on her of about 3 or 3½ knots; so we couldn't be long together.

Q. If she kept right on across your bows, how did buoy 7 get round from her starboard bow to her port bow? A. She covered the buoy, and her engines being working astern, she worked out in the middle of the channel.

Q. Then she didn't go right across your bows? A. She crossed our bows at the rate of three and a half knots.

Q. Up to the time you hit her? A. Up to the time of the collision, and after; when she went to the eastern shore she reversed back into the middle of the channel.

(310) Q. When the steamers collided that stopped her onward progress? A. A little.

Q. And how did she free herself from you or you from her? A. She went right across our bows; she tore right across our bows.

Q. How, if she tore across your bows after the collision, was it that the buoy that she had on her starboard bow got around to her port side? A. I mentioned that. She backed astern after the collision when she went across us.

Q. How far did she tear across your bows before she backed astern? A. She went right to the eastern side of the channel; she covered the buoy; we couldn't see buoy number 7.

Q. You were very close to the eastern side of the channel yourself? A. Yes, sir.

Q. And when you were in collision your stem was against her midships? A. Yes, sir, she fell against our stem.

Q. At that moment, when you were in collision, didn't her stem reach and cover the buoy? A. Yes, sir, I suppose it would.

Q. Then she couldn't have torn much further? A. She went way inside the buoy.

(311) Q. How did the buoy get on her port bow? A. After the collision, when she backed astern.

Q. Your officers have stated that she fouled the number 7 buoy in the collision? A. Yes, sir, she fouled it.

Q. And that she was so close to it that the buoy drifted around from her starboard bow to her port bow? A. Yes, sir; when she backed astern.

Q. Now, how far did she tear on her headlong course across your bow after the collision before she backed astern? A. Her stern went clear of our bow—her stern went across our bow.

Q. Her stern reached your bow? A. Went across the bow, beyond the bow.

Q. And then she backed? A. Yes, sir; she had been backing at the time.

Q. What were you doing at the time? A. We were going full speed astern.

Q. This copy of your log, which you say you sent the owners, you sent as being an account of the collision? A. Press copy taken from the book.

Q. As a fair and truthful account of the collision? A. Yes, sir.

Q. In writing to them sending them that log did you modify the statement at all? A. No, sir; I sent the press copy.

Q. And you sent that as being a full, true, and complete (312) story of the collision? A. Yes, sir.

Q. And added nothing to it? A. No, sir.

Q. Explaining nothing? A. Explaining nothing.

Q. Contradicting nothing? A. Contradicting nothing.

Q. You are willing to have it stand as an account of the collision? A. Yes, sir.

By Mr. FLOYD HUGHES:

Q You say you brought your log up to town on Friday? A. Yes, sir.

Q. Had the chief officer written it up then or afterward? A. Yes, sir; All written up when I brought it up here.

Q. And was written up by him? A. Yes, sir.

Q. And you have found no fault with it since? A. No, sir.

Q. When you first saw this steamer Plymothian how close was she to buoy number 9; that is, the black buoy to the north and west of Lambert's Point pier? A. The water was quite open between the buoy. There was a clear eye between buoy number 9 and when I saw her on the western shore.

(313) Can you estimate the distance? A. I suppose about 200 yards, as near as I can tell.

Q. How close did she pass to that buoy? A. I couldn't say, sir; I didn't see her pass that buoy.

Q. Why did you repeat your signal of two whistles? Because the reply to our first whistle was indistinct.

By Mr. SHARP:

Q. Do you mean by that, that you did not understand what the signal from the Plymothian meant? A. I did not understand what it meant. I saw the steam and as I didn't hear the sound I repeated the second whistle.

Q. You saw the steam, and about 15 seconds afterwards you heard a sound? A. Yes, sir.

Q. And do I correctly understand your saying that at that moment you thought it was an attempt to give a signal of two whistles? A. Yes, sir.

Q. But that you didn't clearly understand it? A. No.

Q. You don't know whether it was two of one or one of two? A. That is the idea, sir.

Q. And for that reason you replied repeating your signal of two whistles? A. The second time.

(314) Q. And you got no reply to that? A. No reply.

Q. And after that you gave the danger signal and commenced to back your boat? A. Yes, sir.

Q. Was there anything done by you or by any person on the Victory from that time that tended to bring about the collision between those two steamers? A. No, sir.

Q. Was anything left undone by you or anybody on the Victory which if done would have tended to prevent the collision? A. No, sir.

Q. Everything was done? A. Yes, sir.

Q. Just give the reason why everything was done? A. We done everything we could.

Q. Why didn't you starboard your helm instead of backing? A. Starboarding the helm, we would have gone ashore.

Q. Why *did* didn't you port the helm? A. Schooner on the starboard bow.

Q. And the effect of that would be what? A. Run over the schooner.

Q. And you did everything that was possible, and nobody on the Victory left anything undone that should have been done? A. No, sir.

(315) Q. And nobody did anything that ought not to have been done? A. No, sir.

Q. And that is your judgment now and was at the time? A. Yes, sir.

Q. And you have no reason to change it? A. No, sir.

Q. And you have stated that the open space between

buoys number 7 and number 9 seemed to you at the place where you were to be about 200 yards wide? A. No; I said from number 9 buoy across the channel there appeared to be 200 yards clear channel.

Q. To what? A. To the Plymothian.

Q. Not that buoy number 9 was 200 yards from buoy number 22? A. No, sir.

Q. But you know there was clear space of channel from buoy number 9, westward, of 200 yards? A. Yes, sir.

Q. At the time you first sighted the Plymothian she was near number 22? A. Yes, sir; I could see the red buoy number 22 ahead of her.

Q. And her movement closed it in? A. Yes, sir.

Mr. MYNDERSE:

Q. I note by your log that repairs were completed at 6 P. M. on Saturday, November 21st? A. That is right, sir.

(316) Q. And you commenced loading outward cargo on Monday morning, November 23d? A. Yes, sir.

By Mr. SHARP:

But you paid wharfage for 11 days waiting? A. Yes, sir.

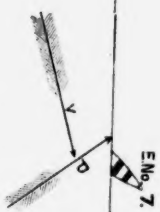


EXHIBIT "A."

(318)

(THE RAVENSWORTH.)

15

EXHIBIT B.

Chief Engineer's Log Book.

SS. Victory from Tyne towards Norfolk.

Hours.	Engineer in Charge.	Pressure of Steam. Boilers.	Receivers 1st.	Receivers 2nd.	Vacuum.	Grade of Expansion.	Revolutions per Minute.	Thermometer. The Sea.	Engine Room.	Feed Water.	Density of Water in Boilers. Fo'd.	Aft.	Remarks. 12th day of November, 1891. State of the Weather and Sea to be noted each day.
A. M													
1													
2		80			25½		60	56	70				Light wind.
3													
4													
5													
6		80			25½		60	56	70				"
7													
8													
9													
10		80			25½		60	56	70				"
11													
12	Stopped for pilot 11 : 30. Full speed 11 : 40 Brought up at Hampton Roads 2 : 10. H. P. spindle gland packed. Left												
P. M.	Hampton Roads 3 : 30 P. M. Working engines to order. Found ship strike at 4 : 15 when running full speed astern.												
1	Found after that ship had been in collision. Finished with engines 5 : 55.												
2													
3													
4													
5													
6													
7													
8													
9													
10													
11													
12													

(Triple-Expansion.—Engineer's Log.) Registered.

....Chief Engineer.

(319) Copy of extract from Chief Officer's Log of S. S. Victory for November 12th, 1891.

1 A. M. Course by Standard in Degrees, S. 50 W., Courses True in Degrees S. 57 W.; Knots 10.; Winds, West.; Fine and clear, smooth water and light winds. 3:20 made Winter Quarter Lt. bearing W. by S., distant 11 miles. 4:45, Assateague Light bore W. N. W. 15′, log 38′. 5 A. M. Courses Standard in Degrees S. 22 W.; Courses True in Degrees, S. 28 W.; Knots 10. 10 A. M., Smith Shoal L. V. abeam, dist. 2′. 11:30 took Pilot on board. Noon, Cape Henry bore S. W., dist. 4′. 2;10 P. M., let go anchor in Hampton Roads. 3:30 hove up anchor (having ing received orders to proceed to Norfolk) and proceeded in charge of Charles Nelson (Pilot) all going well until nearing Crane's Island Light-house, three steamers passing down blew two whistles and passed to Starboard, but a fourth, the Plymothian, coming out of Lambert's Point in spite of our blowing two whistles, ported her helm (a schooner was close aboard of us on the starboard bow at the time, so we had perforce to keep our starboard helm) and stood right across the channel, opening out his port broadside to us; as soon as we saw that a collision was probable we reversed engine full speed astern, blowing three whistles as we did so, but the two vessels came into collision, our ship having little or no headway through the water, the Plymothian crossing our bows to port. Our stem took the other ship amidships, and she having headway, a large portion of her plating was left in the hole made by the collision on our starboard bow; said plating penetrating to the port side, breaking a frame there and forcing a plate (320) out; our anchor was also forced through the port bow. The other ship was cut down 15 or 20 feet and beached. Sounded Peak, making no water, proceeded towards Norfolk. 5:30 moored at Jones' wharf for repairs.

(321) The depositions of the officers and crew of the steamship "Plymothian," taken on Monday, December 28th, and Tuesday, December 29th, 1891, to be read as evidence on behalf of the steamship "Plymothian,"

GEORGE A. SCULLARD, the first witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. George Alexander Scullard, 30, chief engineer of the Plymothian, Portsmouth, England.

Q. State how long you have been an engineer, and how long at sea? A. I have been at sea since 1883.

Q. How long have you been an engineer? A. As chief engineer since 1886.

(322) Q. Just state how long you have been at sea? A. Nine years.

Q. How long have you been chief engineer of the Plymothian? A. Eight months, I think.

Q. Please state if you were on board the Plymothian on the afternoon of the 12th day of November, 1891, and if so, state when she left Lambert's Point pier, and what happened thereafter? A. The telegraph rang to stand by at 4 o'clock in the afternoon; we got under way, then the engines went slow ahead, and before the time could be taken, they stopped again; then went half speed ahead and then full speed. The time was taken at full speed ahead, at 4:05. I had a look around the engines to see that everything was all right, and then ran up on deck to see if we were clear of the pier, as I generally do, and when I arrived at the engine room door I saw the steward, and he said, "there is something coming into us." I looked over the bulwark and saw a ship steering for our bow. Just at this time the telegraph rang and I ran to the engine room and saw full full speed astern and the engines were going full speed astern, and then I ran out on deck, and when I heard we were not clear I ran down to be in the engine room all the time, and about four minutes after tha telegraph rung to go full speed astern, our ship struck something.

Q. You were present in the engine room at the time of (323) the collision, were you? A. Yes, sir.

Q. Who was in charge of and working the engines on that afternoon? A. I was supposed to be in charge; the others were working under me.

Q. Who was on watch, actually working them? A. We were all in the engine-room at the time.

Q. State who "you all" mean? A. The three engineers, myself, Mr. Cronquist, and Mr. Pearse.

Q Mr. Cronquist, the second engineer, and Mr. Pearse, the third? A. Yes, sir; Mr. Cronquist was actually working the engines at the time. He had control of them, assisted by Mr. Pearse. I was there simply seeing that the orders were carried out.

Q. Being then engaged in the engine-room, save for the moment you were on deck, having gone there to see that everything was clear, you know little about the occurrences relating to the collision? A. When I went on deck I went to the ship's side and saw something coming into us and ran below, and at the same time the telegraph rang full speed astern.

Q. As I understand your statement, then, your steamer left the pier on the afternoon of November 12th, and orders to stand by were given at 4 o'clock? A. Yes, sir.

Q. Then the next order was slow ahead, then stop? A. (324) Yes, sir.

Q. Then slow ahead again? A. Half speed.

Q. Half speed ahead and then full speed ahead at 5 minutes past 4? A. Yes, sir; that's it, sir.

Q. Then you continued under that order until 4:10. When the order full speed astern was given, they were promptly obeyed, and your engines continued reversed until the accident occurred, at 4:14? A. 4:14, exactly, sir.

Q. Just state who keeps your log-book and in what manner it is written up? A. Generally, when going in or out of port, the second engineer stands by, and the third stands by the telegraph repeater, and as the orders are given he puts them on the blackboard alongside the telegraph, and at the same time he can turn right around and assist the second engineer. It is only a matter of standing here and turning right around here and assisting the second engineer. He puts down the orders on the blackboard, and I copy it.

Q. You afterwards copy it and enter it in your log-book? A. Between each of these black lines here is a watch.

Q. What does that log of this vessel contain, the full orders? A. As a rule we generally put the time we get under way clear of the port, and the time we get full speed.

Q. You mean by the time you clear, the time you get orders to go full speed ahead? A. Yes, sir.

(325) Q. You record that and any further orders that are given. What is the object of recording the time of full speed ahead? A. That is, when our voyage commences. I take all my averages from that for stores, etc.

Q. Please produce your log-book and file it for identification, and have the notary copy as exhibit "A," with these depositions, the page covering the entries on the 12th of November, 1891.

The witness produces the log-book, the entries of the 12th of November in which are hereto attached, marked exhibit "A."

Q. Were the orders you have enumerated as given on that afternoon promptly obeyed, and did the engines work satisfactorily? A. Yes, sir.

Q. If you know anything else concerning this collision please state it? A. I know nothing further. I didn't leave the engine-room then until after the ship struck, when the engines were put full speed ahead. I worked the engines then myself, and the second engineer started the pumps. I put the engines full speed ahead until they were rung off stop.

Q. The engines were going full speed astern, then, at the time of collision, and had been for four minutes before? A. Yes, sir.

(326) Q. They continued full speed astern how long after the collision before the order for full speed ahead was given? A. Almost immediately, I think. Almost immediately after the collision the engines were put full speed ahead.

Q. Your engines were then put full speed ahead and the vessel was beached? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. What is meant by full speed ahead? How many miles an hour does she go? A. Well, when her way is full up she goes nine knots. She couldn't have had her way up in that short time. We could tell by the working of the engines that she couldn't have her way up then.

Q. At the end of the first minute, after getting the order "full speed ahead," what rate is she proceeding generally? A. From stationary it will take some time to get the ship under way. At the end of the first minute I couldn't say exactly, but I should imagine she would not be going more than a knot an hour the first minute.

Q. A knot an hour at full speed ahead? A. The ship hasn't her headway in a minute.

Q. You have stated that she commenced her movement at 4 P. M., and that the order then was slow ahead? A. Yes, sir.

Q. The next order was stop? A. Yes, sir.

(327) Q. Did the boat actually stop? A. The engines stopped.

Q. But the steamer went ahead? A. I don't know.

Q. How long did you stop? A. I couldn't say exactly, because there were so many orders. There were three or four distinct orders before we went full speed ahead. Went slow ahead, then stop, then half speed ahead, and then full speed; we didn't note all those movements, but we noted full speed ahead at 4:05.

Q. The record, then, does not contain a statement of all the orders that are received in the engine-room at that time from the pilot house? A. No, sir.

Q. You say you got many orders, but you noted some of them? A. I entered the one order "full speed." In working the engines out of port we may be going ahead and astern a great many times; on this occasion it was three times.

Q. But is it a fact or not that you have stated here within the last three minutes as a fact that you got many orders, but you entered some of them? A. I got three distinct orders, but I didn't enter them on the record.

Q. You got three you did not enter? A. Yes, sir.

Q. Give those three? A. Slow ahead; stop; half speed
(328) ahead, and full speed ahead at 4:05.

Q. Those are all the orders you got? A. Yes, sir, between 4 and 5 minutes past 4.

Q. It is not a fact, then, that you have stated to-day in this presence that you couldn't tell how fast the boat would be moving, for the reason that you got many orders, of which you entered some? A. I couldn't tell in any case.

Q. I want to know if you said it—for the reason you got many orders, of which you entered some only; is that a fact, or not? A. It is a fact I entered in my log-book only the one as you have already—full speed ahead.

Q. It was you, then, that made the original entries which are produced in this log? A. I have made those, yes.

Q. Not the second engineer? A. They make them first on the board below, and I take them off when I go to my room to write up the log.

Q. And you found the second engineer had not entered on the board all the orders that were issued? A. Exactly so.

Q. You made up the log from the entries he made on the board? A. Yes, sir; and I was in the engine-room at the time, too.

Q. But he had entered a part only, of what had been given? A. Yes, sir.

(329) Q. At the end of the second minute after getting the order full speed ahead, say at 6 minutes past 4, the boat having left Lambert's Point at 4 P. M., what was the speed, probably, of the Plymothian? A. I really couldn't say.

Q. At 4:07 what would be her speed? A. I wouldn't like to say; in fact, I couldn't tell what it was.

Q. At 4:08 what would be her speed? A. I couldn't say.

Q. At 4:09? A. I don't think I could judge then.

Q. At 4:10? A. No.

Q. You know nothing, then, of her speed? A. I couldn't say what her speed was then; if the ship had been under way some time, the engines going around freely I could tell you then; but under the circumstances I could not.

Q. How long does it take that steamer to back when going ahead full speed, nine miles an hour? A. The engines can be reversed instantly. I don't know about the speed, sir; the deck know better about that.

Q. You know how long it takes to reverse the engines, but do not know how long it takes the steamer to move back? (330) A. No, sir.

Q. You have never acquired such knowledge about that steamer? A. No, sir; in fact, I never have an opportunity. I am always supposed to be in the engine room going into and leaving port.

Q. You can't tell, then, when a ship is actually moving backward? A. I can tell when the engines are moving?

Q. But you can't tell when the ship is actually moving backward through the water? A. No, sir.

Q. Who made the entry there as 4:14, the moment of collision? A. I believe the third engineer on the board. I made it in my log.

Q. How do you know he made it? A. It is his duty to do so.

Q. The third engineer put that 4:14? A. Yes, sir.

Q. You don't know it was 4:14 except from the entry he made? A. Oh! yes, sir; I knew from the clock in the engine room.

Q. Did you look at the clock at 4:14? A. Yes, sir.

Q. And saw the collision occured at 4:14? A. Yes, sir.

Q. Did you look at the clock at 4:10 to see she was back- (331) ing at 4:10? A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. You have stated that at 4:10 you came on deck. For what purpose? A. To see if we were clear of the berth so that I could leave the engine-room.

Q. Clear of the wharf, you mean? Yes, sir; to see if we were under way.

Q. When did you come on deck—at 4:5 or 4:10? A. It was between 4:5 and 4:10, because I looked around to see if everything was clear below, and went on deck to see if we were clear of the wharf.

Q. Was it nearer to 4:5 or 4:10? A. Nearer to 4:10. It must have been 4:10, because that is just the time when the telegraph went full speed astern. That is when I ran down into the engine-room and told them to give her all the speed she could.

Q. You said you looked at the clock? A. I can see the clock and the engine from the platform.

Q. Did you see it from the platform of the engine-room? A. Yes, sir.

Q. Then you were not on deck at 4:10? A. No, sir. You will please understand that it only means two paces from the engine-room to the deck.

Q. The deck was about two paces from the engine-room?

A. I can slip on the deck from the engine-room and be back in a trice.

(332) Q. You say you went in the engine-room at 4:10? A. Yes; when I saw what was about to take place, I heard the telegraph and jumped into the engine-room.

Q. But you left the engine-room at 4:10 to go on deck? A. It was when I returned to the engine-room at 4:10. We went full speed at 4:5, and when I returned to the engine-room, when the telegraph was rung full speed astern, it was 10 minutes past 4.

Q. Could you form no idea, when you went on deck, of the speed of the boat? A. No, sir; just taken a glance and running down below and told them to give her all they can. I saw the telegraph full speed astern, and I told them to give her all they could, and I ran on deck again—went up the engine-room ladder and said to some one "Is she clear?" and they said "No," and I ran down to the engine-room again before the collision occurred.

Q. You say when you ran on deck you saw something coming into you? A. Yes, sir.

Q. How far off? A. I shouldn't like to say the distance.

Q. Very near? A. It was near enough for me to know we must come into collision.

Q. But you stated she was coming right into you? A. Right into our bow.

(333) Q. Right close to you? A. I couldn't say. I am no judge of distance.

Q. You couldn't judge the distance? A. Not at a glance that way. I might if I paused a minute or two; but I just gave a glance and then I ran down into the engine room, so I could be there when I knew something was going to happen.

Q. Was she crossing over the river to meet you? A. I don't know whether she was crossing the river or what she was doing; I know she was coming into our bow.

Q. Was she coming straight at you, or crossing the river? A. She was at an angle coming into our port bow.

Q. She was at an angle to you? A. Yes, sir.

Q. She was on your port bow? A. Yes, sir.

Q. And how was your ship heading at that moment? A. I don't know.

Q. She was on your port bow? A. Yes, sir.

Q. And at an angle? A. Yes, sir, she must be at an angle if she was on our port bow.

Q. How many degrees—45 degrees—90 degrees? A. Not 90 degrees.

Q. 60 or 70? A. It is a hard matter to say; but I should say, approximately, 45. That is to the best of my judg-

ment. I couldn't say that is the angle positively, because (334) it was only a glance. I saw something was likely to happen and I ran away; it wasn't like I stopped there a minute to judge.

Q. But the position was like that of a vessel about 45 degrees on your port bow? A. That is what I should say.

Examined by Mr. MYNDERSE:

Q. What number of revolutions does your engine make at full speed? A. About 63 or 64 ——.

Q. And half speed? A. According to her draft; when she is deeply loaded 64 revolutions.

Q. And at half speed how many revolutions? A. I should say about 50.

Q. And at slow, about how many? A. I really have never taken these; we generally judge; I should say about 30 revolutions.

Q. What is the pitch of your screw? A. 14 feet 6.

Q. Loaded as she was, what would be her slip? A. It would be according to the speed she was at the time; 5 or 8, according to her speed.

Q. Is it usual to keep a record in the engine room of the working of the engines when you are getting away from a dock? A. Always, sir.

(335) Q. Is it usual to keep such a record in the log in detail, or only keep the stand by and full speed? A. I generally take the stand by, work to orders, and full speed. The others are put down if they have proper time to do it. Those that are below, if they have time to turn around and chalk it up before another order is given; if not, they put "working engines to order." This time they didn't have time to record these, and because we were all there and we knew the engines were being moved

Q. It is not usual to keep such a entry in the log? A. In some cases it is. It depends upon the engineer in charge. I have— Every movement is really logged for me in the engine-room for my own satisfaction, if the time allows it.

Q. Suppose you were at sea at full speed and you got a series of orders in the engine-room prior to a collision, you would keep a correct copy of these? A. Every watch is written up, you see—

Q. Orders given while navigating a ship; that is, during a collision, are carefully kept? A. Everything; all our records are kept. Every watch, every four hours, the log is written up.

Q. After you get under your navigation you are careful to keep the record of all the orders? A. Everything.

Q. When handling a vessel around a dock or getting away from the docks, it is not practicable to keep a record of every movement? A. No, sir.

(336) Q. Did you hear any of your whistles that day? A. I heard it, but didn't take any notice.

Q. How is it with respect to strength? A. There has never been anything the matter with it.

Q. How about that day? A. Perfectly clear and loud.

RE-EXAMINATION.

By Mr. HUGHES:

Q. You heard whistles, as I understand, and recognized they were clear and loud, with nothing the matter with it; but in attending to your other duties you didn't take notice of the exact time they were blown? A. No, sir.

Q. You said you were not able to tell what speed your vessel was making, but you could tell from your engines she was not making full speed? A. Yes, sir. From the time we got under way we couldn't possibly get her speed on her.

Q. You have been asked a great deal about what you did at 10 minutes past 4. As I understand your statement it is that at 5 minutes past 4 the telegraph rang full speed ahead; that you heard that signal given and saw it recorded, and that you spent some little time in your engine-room to see that the engines were working satisfactorily, and then stepped out on deck, gave a glance at a steamer on your port bow, and immediately stepped back into the (337) engine-room just as the telegraph rang full speed astern, and that it was then 10 minutes past 4? A. Yes, sir.

Q. In the expression you "saw a steamer coming right into you," do you mean in respect to close distance she was off your steamer, or in respect to the direction she was moving? A. Both in direction and speed.

Q. Then she was moving rapidly and in a direction immediately into you? A. Into our bow.

Q. (By Mr. Sharp) The order to back was after you look, at 4:10, or just at that time? A. Just at that time.

CORNWALLIS CRONQUIST, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. What is your name, age, residence, and occupation? A. Cornwallis Cronquist; 30; London; second engineer of the Plymothian.

Q. How long have you been an engineer, and how long at sea, and how long have you been on board the Plymothian? A. I have been 8 years an engineer; 9 years at
(338) sea; have been in the Plymothian since 4th November, 1890.

Q. Were you on board the steamer Plymothian on the afternoon of the 12th of November, 1891? A. Yes, sir.

Q. And state, if so, what duty you were performing and where you were stationed? A. I was down in the engine-room about 3 o'clock to make everything ready to leave the pier—to clean the engines up and get everything ready to start away, and at 4 o'clock we were all ready and they rung stand by on the telegraph at 4 o'clock in the afternoon, and of course we answered the telegraph back, getting everything ready, and directly afterwards we were telegraphed again slow ahead; then there was to stop after that—after slow ahead; a very short time the stop was, then slow ahead again, then came up to half speed ahead, and then to full speed ahead.

Q. What time did you get the order to full speed ahead? A. The time the full speed ahead was given was put down at 5 minutes past 4.

Q. Who put that down? A. The third put that down I worked the engines.

Q. Right in this connection, just state who was working the engines? A. I was working the engines.

Q. That was your duty at the time? A. Yes, sir.

Q. Those orders you promptly obeyed, did you? A. Yes, sir.

(339) Q. How did the engines work, satisfactorily? A. Yes, sir, every movement.

Q. You were assisted in working the engines by the third engineer, were you? A. The third was the assistant to me.

Q. And he stood by the telegraph and noted the orders as they were given, when he had time? A. Yes, sir.

Q. Well, at 5 minutes past 4 you got the order "full speed ahead?" A. Yes, sir.

Q. And what was the next order? A. They went full speed ahead for some minutes, and I attended to the engines, and of course they then stopped and full speed astern at once.

Q. That was one order? A. From full speed ahead around to full speed astern.

Q. You promptly obeyed that order? A. Yes, sir.

Q. What happened after that? A. When they were at work for several minutes then there was a lot of sound on deck, and then four minutes afterwards we heard the crack

of the collision; we had been working for four minutes full speed astern.

Q. The collision, then, occurred at 14 minutes past 4? A. 14 minutes past 4.

Q. What was the next order after the collision; the en-
(340) gines were going full speed astern at the time of the collision and had been for four minutes theretofore? A. Then they was stopped after that, and started ahead for some time. I couldn't give you any certain time how long the stop was.

Q. Then what was the next order? A. Then full speed ahead.

Q. How long had the engines been full speed astern after the collision? A. They didn't work after the collision.

Q. You got the order to stop almost immediately after the collision? A. Got the order to stop.

Q. Was there any trouble with your whistles on that afternoon? A. No trouble with the whistles whatever.

Q. You could hear them where you were stationed? A. I could hear them down in the engine-room.

Q. Describe them? Were they loud, clear and distinct? A. Very good, sir.

Q. Did you notice how often they were blown? A. No, sir.

Q. Being in the engine-room you of course knew nothing of what took place on deck or anything about the collision? A. No, sir. I did not go on deck until some time after.

CROSS-EXAMINATION.

By Mr. SHARP:

(341) Q. The collision happened, you say, about 4:14? A. 4:14.

Q. How do you know that? A. Because it was put down.

Q. Because it was put down? A. Yes, sir.

Q. By whom? A. When we had to stop the engines.

Q. You were engaged working the engines? A. Yes, sir.

Q. What was the first time after that that you looked at the board to see what time it was? A. I always take the time from the clock when I stop or start, and tell the third to take it.

Q. You took the time 4:14? A. 4:14.

Q. And gave him the order to put it down? A. Yes, sir.

Q. You have just stated that you recollected it from seeing it on the board? A. Yes, sir; from the time. I take

the time by the clock, and take the time afterwards on the board.

Q. What was the first time you saw it on the board? A. When we stopped.

Q. Did you leave the engines to see the man put it down? A. No, sir; the board is right by my side.

Q. You saw it put down at 4:14? A. Yes, sir.

(342) Q. Did you see him put down the next entry, when you went ahead? A. Yes, sir. There was no difference in the time.

Q. No difference? A. Not what we can take.

Q. You went ahead at the same time you stopped? A. Yes, sir. If there was not more than a minute's difference we don't take the time.

Q. You didn't take any note of the time that elapsed between the 4:14 and the time you went ahead? A. Yes, sir.

Q. So you don't know what entry was put in the book for that? A. No, sir; I couldn't tell anything about that.

Q. Didn't you look on the book to see? A. No, sir. When the chief engineer took charge of the engines I went to the donkey pump.

Q. And you havn't seen it since? A. Not since I took it.

Q. Was it 4:17, 18 or 19? A. I didn't say that.

Q. I say it. Do you think it was 4:16, 4:15 or 4:18? A. It couldn't be more than 4:16.

Q. You think it was about two minutes, then, after the stopping that she went ahead? A. Yes, sir.

Q. About two minutes? A. Yes, sir; I judge it would be about two minutes.

(343) Q. How did you form a judgment that it was four minutes from the time you got the order to reverse—how did you know that? When did you get that order, at what time? A. I could judge that because I was running the engine; I was at the afterpart of the engine.

Q. I mean when you got the order to reverse before the collision occurred. What time was that? A. When the collision occurred?

Q. Before it occurred, when you got the order to reverse just before; what time was that? A. Five minutes past four to go full speed ahead.

Q. What time did you get the order to reverse the engine? A. After I had full speed ahead?

Q. Yes, sir. A. It was four minutes after. We had worked her four minutes before we reversed her—more than that. It was 4:10 when we had the next movement in the engine-room.

Q. What was that movement at 4:10? A. It was full speed astern.

Q. At 4:10? A. Yes, sir.

Q. How do you know it was 4:10 when you got that order? A. It was put down on the blackboard.

Q. You saw it on the blackboard? A. Yes, sir.

Q. Who put it there? A. The third engineer.

(344) Q. You didn't put it there? A. I didn't put it there.

Q. And you know it only from that circumstance? A. I took the time—looked at the clock at the same time.

Q. You looked at the clock and told him to put it there? A. Always do that.

Q. You did that? A. Yes, sir.

Q Why did you feel so much out about the time just now, if you knew so much about it? A. I felt no out about the time.

Q. You are very positive it was two minutes after the collision that you got the order to go ahead again? A. I am not about that time; I couldn't tell exact.

Q. Who gave that order? A. I couldn't tell that, because I was engaged then with the donkey pump.

Q. Who was working the engine? A. The engines was working, and I got an order from the chief to work the donkey pump.

Q. When you left to go to the donkey pump who took your place? A. The chief.

Q. Can you tell, when in the engine-room, when a boat is moving backward through the water? A. No, sir, I could not.

Q. You can't tell? A. No, sir, can't tell the distance.

Q. Can you tell whether she is actually moving back-

(345) ward or not? A. No, sir.

Q. Can't tell whether the ship is going backward or forward? A. No, sir.

Q. What is the full speed of your boat? A. The revolutions?

Q. No; I mean how many miles an hour? A. Nine and a half I think the average is.

Q. Sometimes more? A. Sometimes more, according to the draft of the ship.

Q. Well, was she making nine miles an hour going down that day or not? A. I couldn't say anything about that; I shouldn't say she would make that speed.

Q. How much do you think she was making at full speed then? A. Well, I couldn't say, because I was not on deck.

Q. Seven miles an hour? A. No, sir; wouldn't say she was making 7 miles at that time.

Q. Six miles? A. I should say 4 or 5 was the most, from the time she was working full speed.

Q. That would be about your judgment, 4 or 5 miles an hour? A. At that time.

Q. And how many revolutions? A. We make 60 to 61 revolutions at full speed; that time she wouldn't make 61.

Q. You got the order "full speed," but you didn't obey it? A. Yes, sir, obeyed it; but the ship didn't have full (346) speed; the engines did'nt have the full speed when they started.

Q. That is, at first; but she had been going full speed for five minutes. Can you give that ship full speed in five minutes? A. No, sir.

Q. How long will it take? A. I should think it will take ten minutes before the ship has full speed, if not more. I have never been on deck to notice it. That is only my judgment.

Q. Your judgment is formed from never noticing— A. That is all.

Q. How long does it take your boat to move backwards through the water when moving at the rate of 4 or 5 miles an hour? A. Couldn't say anything about that.

Examined by Mr. MYNDERSE:

Q. How long had you been in the Plymothian before the collision? When did you join her? A. Last November; November of last year.

RE-EXAMINATION.

By Mr. HUGHES.

Q. Mr. Cronquist, when the third engineer records these notes of time on the bulletin does he get them from the clock or from your order? A. Gets them from my order and gets them from the clock himself.

Q. When he gets your order he looks at the clock and (347) notes the time? A. Yes, sir.

Q. You are doubtful how soon the order for full speed ahead came after the collision? A. Very doubtful.

Q. But a record was made of it? A. I started the engines, and then I went to the donkey pump.

Q. That record is correct, whatever it was? A. Yes, sir.

Q. It was taken from your order and from the clock? A. Yes, sir.

Q. And in the same way the time of the collision was taken from the clock when the crash came? A. Yes, sir.

WILLIAM PEARSE, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence, and occupation?

A. William Pearse; 23; Minehead, England; third engineer of the Plymothian.

Q. How long have you been an engineer, and how long have you been at sea, and how long on board the Plymothian?

A. Seven months on the Plymothian; marine engineer about twelve months.

(348) Q. How long an engineer? A. Of course I served my time—five years. Six years altogether. Of course it is different, an engineer on land and sea.

Q. Your occupation as an engineer has been six years, although you have not been to sea but one year? A. Yes, sir.

Q. Where were you on the afternoon of the 12th day of November, 1891, and what duties were you performing? A. I was in the engine-room assisting the second engineer, as he was in charge of the engines at the time. It is our rule for all of us to be in the engine-room on leaving port.

Q. The chief engineer was also in the engine-room? A. Yes, sir; he was also there.

Q. What was your particular duty when the signals for different orders were given? A. Stand by the telegraph.

Q. You stood by the telegraph? A. Yes, sir.

Q. Who recorded the orders? Who put them up on the bulletin? A. I did, sir; I put them down, sir.

Q. State what orders were given on that afternoon from four o'clock up to the time of collision? A. Four o'clock was an order to stand by, and between four and five minutes past four was slow ahead, then stop, then half speed ahead, then full speed ahead at five minutes past four. The telegraph rang at 10 minutes past 4 full speed astern, and at 14 minutes past 4 the collision.

(349) Q. Which of those orders did you note on the bulletin? A. I noted them all except between 4, and five minutes past 4, which I had not time to do so, I had other work to do.

Q. You had other work to perform assisting the second engineer to work the engines? A. Yes, sir, between 4 and five minutes past 4.

Q. In entering those orders how did you get the information as to the exact time? A. By looking at the clock.

Q. You looked at the clock and noted them down? A. Yes, sir, as soon as the orders were given.

Q. Were any orders passed to you from the other officers in the engine room at the time? A. From anyone on deck?

Q. No, from anyone in the engine room at the time? A. No, one; of course only looking after our duty, looking after the engines as they were working.

Q. You made those entries from the clock and they are correct? A. Yes, sir.

Q. You were in the engine room the whole time, and know nothing of what transpired on deck? A. Yes, sir.

Q. Could you hear the whistle of your boat? A. I heard the whistles, but took no notice of them.

Q How were they with respect to distinctness and clearness? A. I heard the whistles, I couldn't tell you whether it was once, twice or thrice.

(350) Q. I say in respect to clearness, how were they? A. I couldn't exactly say, sir. I could hear the whistles, but couldn't tell whether they were distinct or not.

Q. You only know you heard them in the engine room? A. Yes, sir.

Q. But don't know how often they were blown—what intervals? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. Did you look at the clock as to each and every one of those items? A. Yes, sir.

Q. One of them fixes 4:15 P. M. as the order to go ahead at full speed after the collision? A. 4:15.

Q. Yes, sir? A. No, sir.

Q. Yes, sir? A. No, it want 4:15.

Q. Did you put that order there? A. No, sir, didn't do it.

Q. That was the time after the collision, 4:15, that the order to go ahead was given; did you make that entry? A. Not that I know of.

Q. How long did you remain after the collision before she went full speed ahead? A. Almost immediately went ahead full speed on the mud.

(351) Q. She didn't stop her movement at all then; she kept on past the Victory? A. She went astern, then stopped and went full speed ahead.

Q. Went astern? A. She was astern when the collision happened.

Q. You mean the engines were astern or the boat was going astern? A. The boat is bound to go astern if the engines are astern.

Q. In your judgment, then, it is a fact that whenever the engines are going astern the boat is bound to go astern? A. Yes, without anything is holding her.

Q. Every time? A. Every time.

Q. And you think because the engines were reversed the boat was going astern? A. Yes, sir.

Q. Through the water? A. Yes, sir.

Q. That happens every time? A. Every time the engines go astern.

Q. She was going backwards, then, away from the Victory, and afterwards she was rung up and went ahead t A. I don't think she was going back from the Victory, because I was not on the deck to see. I know the telegraph was rung to go ahead.

Q. You know she was going astern? A. I know she was going astern, but whether from the Victory or not, I don't know.

(352) Q. You only know that when the engines are reversed the boat in going back through the water? A. Yes, sir.

Q. And the engines were reversed four minutes? A. Yes, sir.

Q. And, in your judgment, she was moving backwards through the water four minutes? A. Yes, sir.

Q. And during that time the Victory was approaching her, while she was moving backwards? A. I couldn't tell whether she was going away from her or not. The collision occurred four minutes after going astern.

Q. Well, this collision occurred this way: your boat was going backwards four minutes through the water? A. Yes, sir.

Q. And that happened in the four minutes? A. The collision happened at the end of the four minutes.

Q. And then after that she went ahead. Did she go ahead immediately on being rung up? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. The engines were reversed and she went ahead as soon as— A. She had way on her and the ship was going astern; of course she wont go ahead as soon as the engines are reversed.

Q. Well, I say the orders were issued for her to go ahead, (353) but she did not actually go ahead, she had to wait some time to overcome her forward movement? A. Yes, sir.

Q. How long, do you suppose? A. I dare say half a minute.

Q. In your judgment, then, when that boat is moving backward through the water, she can recover and go forward in half a minute? A. Yes, sir.

Q. You have seen this boat do it? A. Not this boat, but I have seen a boat do it.

Q. Where? A. I have seen 40 or 50; I could mention perhaps a hundred.

Q. You have only been to sea one year? A. The second of this December was 18 months.

Q. And you have seen 40 or 50 boats do that in that time? A. Yes, sir.

Q. Name them. A. The "Start" was one.

A. And she went ahead in half a minute after moving backward? A. Yes, sir.

Q. And you say your boat was moving backward— A. She was going astern four minutes and then the telegraph rang to go ahead, and then allow half a minute to a minute to go ahead again.

Q. But your boat was actually moving backward through (354) the water for four minutes? A. Yes, sir.

Q. And you have seen other boats do it? A. Yes, sir.

Q. From the time the order to go back was given, the engines would not only go back, but the boat? A. You mean when the engines are going astern the boat is bound to go astern?

Q. Yes, sir. A.. Yes, sir.

Q. And you have seen many boats do it? A. Yes, sir.

Q. In different parts of the world? A. Yes, sir.

Q. From the time the engines are reversed the boat goes backwards? A. Yes, sir.

Q. That is bound to be? A. Yes, sir; that is, if there is nothing holding her to prevent her going back.

Examined by Mr. MYNDERSE:

Q. Suppose she has got steering way ahead and the engines are reversed? A. That will stop her proceeding ahead and she will go astern.

Q. How soon will she go astern? Does that depend upon how much headway she has? A. Yes, sir; if she has full speed ahead, it will take longer to go astern; but she (355) will only take about a minute.

Q. You got an order to go full speed ahead at 4:10? A. At 4:05, sir.

Q. And to go full speed astern at 4:10? A. Yes, sir.

Q. And the collision occurred at 4:14? A. 4:14.

Q. Well your engines were still reversing at that time? A. Yes, sir, astern.

Q. And then it was very shortly after the collision they were put full speed ahead again? A. Yes, sir.

RE-CROSS-EXAMINATION.

By Mr. HUGHES:

Q. What time was that order full speed ahead given, after the collision? A. About a minute I should think. About 15 minutes past 4.

Q. Do you recollect whether you recorded that on the

belletin, or not? A. I couldn't exactly say whether I put that on the board then, or not, as I had other things to do after the collision, starting the donkey pump and so on, and wouldn't have time to do so.

Q. Who took charge of the engine after the collision? A. The second engineer had charge of the engines.

(356) Q. After the collision what did the chief engineer do? A. The chief engineer was down below looking after the pumps, and seeing if everything was all right.

Q. Who worked the donkey engine? A. The second; the chief and myself looked after the engines and the telegraph.

Q. The chief engineer, then, took charge of the engines, and the second started the donkey pump? A. Yes, sir.

Q. You have stated that when a vessel is under way, full speed ahead, and the orders for the engines to go full speed astern are given, that it takes some time to overcome tho movement ahead before she moves backward through the water, and you estimate that time at about a minute? A. About one minute. One minute would be the outside.

Q. So that you think the vessel was actually moving backward through the water before the collision, having the engines full speed astern before the collision? A. Yes, sir, she was moving backward before the collision occurred.

H. W. HAM, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. (357) Henry Wilson Ham; 33; Plymouth; mariner.

Q. How long have you been at sea? A. About 15 years.

Q. How long as officer? Just state on what steamers you have served. A. All the names?

Q. As officer? A. First the "Penguin" as third officer, then back in sailing ships again until the "Agra," then from the "Agra" to the "Donati," then from the "Donati" to the "Venetian," from the "Venetian" to the "Mount Edgecombe," from the "Mount Edgecombe" to the "Engineer," "Engineer" to the "Sweden Tower," and "Sweden Tower" to the "Plymothian."

Q. How long have you been first officer on the Plymothian? A. Since November, 1888.

Q. You were first officer on the Plymothian on the 12th of November, 1891, were you? A. Yes, sir.

Q. Who keeps the log on board your vessel? A. I write it up. There is a scrap log kept when at sea, and the officer on watch puts it down in the scrap log, and I write it up afterwards.

Q. Have you the log of your steamer showing the entries on the 12th of November, 1891; if so, please produce it and file it for identification, and have the entries copied by the notary and filed with these depositions marked exhibit "B"? (358) A. A copy of the entry of the 12th of November, 1891, in said log-book is hereto annexed, marked exhibit "B."

Q. Please state where you were stationed when your steamer left Lambert's Point, and at what time she did leave? A. On the forecastle head; she left at 4 o'clock.

Q. Who was on the bridge in charge of and navigatihg your steamer? A. The captain and pilot.

Q. A Virginia pilot? A. Yes, sir.

Q. Who was at the wheel? A. William Lyons and John Hendema.

Q. How was the rest of the crew stationed and what doing? A. The rest of my watch were on the forward deck, and the second mate's watch on the after deck.

Q. What doing? A. Clearing up the ropes and getting everything ready for sea.

Q. They were engaged in clearing up the ship? A. Yes, sir.

Q. And you were superintending your watch? A. I was looking after everything in general—that is, as regards getting everything ready.

Q. And in the performance of those duties what portion of the ship did you visit from the time you left the pier until the collision? A. I was all over—that is, on deck.

Q. Please state the direction in which your vessel pro- (359) ceeded after she left the pier, and state the occurrences, so far as you saw them, from the time your ship left the pier to the time of collision? A. Of course, we came right straight out from the pier until we came around the buoy—

Q. Under what helm? A. It would be a port helm, but the pilot was looking after that.

Q. You came out under port helm, but don't know the orders given by the pilot to the helmsman? A. No, sir.

Q. How close to buoy number 9 did you pass? A. I didn't notice it.

Q. Which side of the river did your steamer pass down? A. On the eastern side, sir.

Q. How close to the eastern edge of the ship channel did she proceed? You say she proceeded down the eastern side of the ship channel; just give how near to the eastern edge—on what part of the channel did she take? A. We kept as near as possible to the eastern side, as well as I can judge.

Q. Now, just go on and state what occurred under your observation from that time to the time of collision? A. Before we left the pier the whistles were blown to give vessels notice we were coming, several times, and also the whistles were blown to salute the tugs Pioneer and Commodore.

(360) Q. Did you hear those whistles, and how were they with respect to being loud and clear? A. Perfectly distinct. Then, after that my attention was drawn to the whistles by hearing our whistle blown once, I heard it blown twice before we heard any answer from the Victory, and then she replied with two blasts.

Q. What movement did you observe on the Victory when those two blasts were sounded? A. He was directing his course to starboard.

Q. What position, with respect to the channel, was he then occupying? A. He was on our port side.

Q. How in respect to the main ship channel? Was he on the eastern edge, the western edge, or the middle of the channel at the time he blew the two whistles that you heard? A. He would be, of course, to the west of us.

Q. How far from you? Was he in the centre of the channel or on the western side of the channel? A. I could hardly say.

Q. Just continue. What was done aboard your vessel from the second blast? A. After he replied with two blasts we gave three blasts and the engines went full speed astern and the helm hard-a-port to try and avoid a collision if possible.

Q. What movement did your vessel make in response to these orders of reversing the engines and the helm being put hard-a-port? A. I didn't observe the movement which

(361) way she went. I was looking out to see whereabouts we were going to be hit.

Q. You did not observe the movement of your own vessel? A. No, sir, I was watching the other one.

Q. Describe the movements of the other one? A. She came in, I thought she would hit us on the forecastle head first. I went down off the forecastle when I thought she was going to hit us on the forecastle head and gave every one notice to lookout, and just as I had time to go up to the bridge I saw she was past, and then I went forward again, and of course she hit us there amidships.

Q. State the respective speeds of the two vessels at the time they came into collision? A. We had stern way on us; but how much I don't know. The Victory had headway I should say, sir

Q. You had sternway; but how much you can't say? A. Can't judge.

Q. What did you estimate to be the speed of the Victory? A. I should think about three knots.

Q. He came into you about three knots? A. Yes, sir.

Q. How had your speed been before your danger signals were sounded and the engines were reversed? A. Full speed. Not regular full speed; but the telegraph was at full speed.

Q. The telegraph was at full speed—how about the rate (362) of speed of your vessel through the water? A. From four to five knots.

Q. She had not then had time to respond to the movement of her engines? A. No, sir.

Q. How long after the danger signals were sounded and the engines were reversed was it before the collision occurred? A. After the engines were reversed?

Q. What time elapsed from the time the engines were reversed until the time of the collision itself? A. From three to four minutes I should judge.

Q. And in that time your vessel felt the effect of the movement of the engines, her headway was entirely checked and you think she was making sternway? A. Yes, sir.

Q. Where did the collision occur with respect to black buoy number 7? A. A little this side of the buoy.

Q. Do you mean to the north or south of the buoy? A. To the south.

Q. Did you observe the buoy at the time the vessels came together, and if so, how did it bear? A. Not until after we were clear.

Q. What was done on your vessel immediately after the collision? A. After we cleared we put the engines full speed ahead, and——

(363) Q. Before you got clear how were your engines working? A. Full speed astern. After we cleared and the ship had bounded back, we put the engines full speed ahead and headed her over to port and put her on the beach.

Q. Where did you observe the buoy to be immediately after the collision, or did you observe it? A. I did not observe it until we were hard into the beach.

Q. How did you pass it? A. On the port side, I think.

Q Do you know how the tide was that day? A. Flood tide.

Q. Did you observe any sailing vessels in the river at that time? A. Not any near us.

Q. Where there any near the Victory so as to make any obstruction in respect to shaping her course? A. I didn't notice any.

Q. As I understand, then, from your statement you heard several whistles sounded from your vessel after you left the

pier, but took no particular notice of them, but were attending to your other duties, clearing up the vessel? A. Yes, sir.

Q. Your attention was first called to the Victory by hearing two single blasts given at intervals from your steamer, and hearing two whistles blown in response to the second one you heard from your vessel, from the Victory? A. Yes, sir.

(364) Q. But she was then on your port bow? A. Yes, sir.

Q. And moving under starboard helm? A. Yes, sir.

Q. That she continued that movement and came into you, striking you amidships? A. About amidships.

Q. Your vessel in the meantime immediately upon hearing cross signals given from the Victory, having sounded her danger signals, reversed her engines full speed astern and thrown her helm hard-a-port? A. Yes, sir.

Q. What was the effect of such movement on your vessel in respect to her movement when the engines went full speed astern and the helm was thrown hard-a-port, how must your vessel have moved? A. It would throw her head to starboard with the tide running up.

Q. The tide running flood, then, would assist the movement to starboard of your boat? Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. What did you say was your age? A. 33, sir.

Q. And on the 12th of November you were stationed on (365) the forecastle head of the Plymothian? A. Yes, sir.

Q. From what time? A. Till after we—

Q. Began at what time? When you left the pier? A. From the time we left the wharf, off and on, until we struck the Victory.

Q. When did you first leave the forecastle head? A. After we had the ropes in after leaving the wharf.

Q. You left, then, as soon as the ropes were in? A. Yes, sir.

Q. Where did you go then? A. Went down on the main deck.

Q. Could you see anything from that point? A. Not from where I was. I went on the forecastle head again.

Q. Did you pass the buoy as you got on the forecastle head? A. I never noticed buoy number 9.

Q. You never noticed that buoy at all? A. No, sir.

Q. What is the conformation of the channel at that point; does the channel make out to the east or west? A. I don't know anything about that, sir.

Q. How often have you been in this harbor before? A. Once.

Q. For how long a time? A. Beginning of this year.

(366) Q. Remained how long? A. Coaling.

Q. One day? A. One day—night.

Q. Came in at night? A. At least just before dark.

Q. Went out when? A. Went out the next morning.

Q. Did you see the buoys then? A. Didn't take particular notice of the buoys.

Q. And this was your second visit? A. Second visit, except some seven or eight years ago, when we discharged here.

Q. Did you recollect anything of the buoy lines in those seven or eight years. A. No, sir.

Q. Then your knowledge of the buoy lines is limited from that time you stayed one day, and this time. Did you see buoy number 24? A. I don't know. I couldn't tell you anything about them.

Q. What is the color of the buoys on the west side of the river? A. I don't know. I know number 7 buoy.

Q. What is the color of that? A. Black.

Q. That is the only buoy you saw at all? A. That is the only buoy I took particular notice of.

(367) Q. That is the only buoy you noticed that day? A. Yes, sir.

Q. Then all you know about the channel, its width and length and shape, is from knowing buoy number 7? A. Yes, sir.

Q. And you were on the forecastle head how many minutes? A. Not very long; perhaps one or two minutes.

Q. Were those whistles given before you left the forecastle head? A. My attention was drawn when I was on the main deck.

Q. The first time you heard the whistles—? A. The one whistle from the steam whistle.

Q. She didn't then give any whistles in your hearing, when moving out of the dock? A. This was after we moved out.

Q. You say first you were on the forecastle head and you then went down on the main deck? A. Yes, sir.

Q. And after leaving the forecastle head, where you stayed two minutes and being on the lower deck—how long did you remain there? A. Just walked from one end to the other.

Q. And how long had you been on the upper deck before you heard the whistle, your own vessel's whistle? A. I don't quite understand the question?

Q. How long had you been on the main deck before the

(368) Plymothian whistled? A. Before the whistles were given?

Q. The first whistle you heard at all; how long had you been there? A. A very short time.

Q. Two minutes, you think? A. No, sir.

Q. One minute? A. It was so fast you couldn't tell. I didn't notice the time.

Q. But it was some time after you had been there; you can't tell whether it was one minute or three minutes? A. I didn't notice

Q. You think it was two minutes? A. I couldn't say.

Q. Between one and two? A. It was very short.

Q. The engineer has spoken about various orders about the movement of the boat, and that the first order was slow ahead. Did you see her go slow ahead? A. I heard the telegraph ring from the forecastle head and I know the vessel was going ahead slow then.

Q. Did you hear the order to stop? A. I didn't notice. I heard the telegraph ring several times, but what for I couldn't say. I heard it ring.

Q. What for? A. I couldn't say.

Q. Did you hear the telegraph order half speed ahead (369) again? A. I couldn't tell. I heard the telegraph ring several times.

Q. Did you see her again at half speed? A. I was not noticing her speed.

Q. Not at all? A. Not then, to see if she increased.

Q. Under what helm was she moving? A. I didn't notice. I was looking after the work in general.

Q. How was she heading? A. After leaving the wharf?

Q. Yes, sir? A. Right straight out from the pier.

Q. Right straight ahead to the north, you mean? The channel runs about north? A. Straight out from the pier.

Q. Across? A. Yes, sir.

Q. She didn't go, then, right straight down the river, but headed across the river? A. She came out until she got clear so she could come around clear.

Q. Did you see her when she turned? A. Not exactly when she turned round.

Q Where were you when she turned? A. I couldn't say, because I didn't see her turn around.

Q. Then you don't know what her movements were until shortly before the collision? A. No, sir.

(370) Q. Where were you when you first saw the Victory? A. I was on the forecastle head.

Q. When you moved out from Lambert's Point pier? A. Yes, sir.

Q. How close were you to the pier at that time; very near? A. When I first saw the Victory?

Q. Yes, sir. A. No; we were clear of the pier when I first saw the Victory.

Q. Were you a hundred feet from the pier? A. I don't know the distance.

Q. A short distance? A. I don't know the exact distance.

Q. You had left the pier? A. Yes, sir.

Q. And you heard no signal from your boat? A. I didn't notice any.

Q. At that time? A. No, sir.

Q. But at that time you looked down the river and saw the Victory on your port bow, you say? A. I didn't say the port bow.

Q. What did you say? A. Starboard bow.

Q. When you first saw the Victory was she on your starboard bow? A. Yes, sir.

(371) Q. When you were going across the river? A. Just when we got clear of the wharf.

Q. When did you see her on your port bow? A. After we headed down thr river.

Q. You say you don't know when you headed down the river? A. Such time as we got clear of the wharf and the buoy.

Q. You headed down the river, you think, when you cleared the buoy? A. Before we cleared the buoy, I expect.

Q. Do you think you headed down the river before you cleared the buoy, or after you cleared the buoy? A. After we cleared the buoy.

Q. But you didn't see the buoy; would that be below the buoy? A. No, certainly not; I was busy getting in the anchor and ropes—

Q. You were occupied with your work? A. Yes, sir.

Q. You were not a lookout? A. No, sir.

Q. And were so much occupied with your work that you were not noticing the channel line? A. Yes, sir; I know the channel line. It didn't take long to see which side of the channel we were on.

Q. What way have you of ascertaining the boundaries of the channel if you didn't see the buoys? You say you didn't see buoy 22 or 24 or buoy 9. How could you tell (372) what part of the channel you were on? A. I could see the land, and tell whether I was on this side or that side.

Q. You could see from land to land? A. I could tell what side we were on.

Q. By seeing from shore to shore, and not from buoy to buoy? A. I could see number 7 buoy. I noticed we came down the eastern side of the channel.

Q. And you judge it was the eastern side, not from looking at the buoy, but from the shore? A. I know it; the channel runs from north to south.

Q. Well, give its course by compass? A. The channel seems to run north an south.

Q. Due north and south? A. I can't say whether it was due north and south.

Q. Did you ever take its compass bearings? A. No, sir.

Q. You never saw it but once before? A. I had a chance to see then.

Q. You coming in at night before? A. I said just before dark.

Q. And you didn't notice it? A. We passed several buoy the first time I came up.

Q. But you stated you didn't remember those buoys? A. Yes, sir.

Q. But you say, without knowing anything about the buoys, you think you were on the eastern side of the chan-
(373) nel, because you were on the eastern side river? A. Yes, sir.

Q. And only for that reason? A. I knew how the channel ran, which was the east side and which was the west side.

Q. I am trying to find out whether you ascertained which side of the channel you were on, from the land or from the buoys? A. No, I went and looked at a chart.

Q. When? A. A day or two after the collision.

Q. And looking at the chart a day or two after the collision you observed that you were on the east side of the channel; A. I knew which side we came down. It was not a great distance from Lambert's Point to where we struck.

Q. What was your objection to looking at the buoy line? A. I don't know that I had any objection.

Q. You had something else to do? A. Yes, sir.

Q. What were you engaged in? A. Clearing up everything before dark.

Q. How long did that take you? A. We hadn't finished when the Victory struck us.

Q. You were fully occupied from the time you left Lambert's Point until the Victory struck you? A. Yes, sir.
(374) Q. At what place? A. Different places.

Q. What is the formation of that vessel's rail. Can you see ahead unless you look over the rail? A. From certain positions if she was on either bow I could see her.

Q. How close would you have to be to the rail? A. Pretty close; that is, if the vessel was on the bows.

Q. Could you see by looking ahead? A. Couldn't see right ahead over the deck.

Q. What would be a good point of observation? A. The forecastle head.

Q. And you left the forecastle head to attend to your other business? A. Yes, sir. I came and went two or three times.

Q. How long did you stay on the forecastle head? A. I didn't stay very long.

Q. You didn't see the buoy when you came off the forecastle head the first time; did you see it the second time? A. I never saw buoy number 9 at all, at any time.

Q. You have stated upon examination in chief that you were so much occupied attending to business that you did not observe the movements of your own vessel? A. Yes, sir.

Q. How far off was the Victory when you came to the forecastle head the second time? A. She was not a great way off.

(375) Q. Well, how far? A. I couldn't say exactly, sir.

Q. Could you judge approximately? A. Perhaps she would be a little over a quarter of a mile off; perhaps not that.

Q. On which bow was she then? A. On the port bow.

Q. You stayed away from the forecastle head how long before returning the third time? A. I went up there very quick, because I heard the whistles blowing again, and not hearing any answer, I went up there very quick.

Q. How far off then was the Victory from the Plymothian when the first whistle was blown to her? A. I didn't hear our first whistle blown.

Q. Didn't hear it? A. No, sir.

Q. Where were you? A. I might have been on the forecastle head, or might have been on the main deck. I didn't hear the first whistle; I only heard the last two whistles.

Q. Where were you when the second whistle was blown? A. On the main deck.

Q. How far off from the Victory were you then? A. I should say she was under a quarter of a mile.

Q. And at that time on your port bow? A. Yes, sir.

(376) Q. How was your ship heading at that time? A. Heading down the river.

Q. And continued to head down the river all the time? A. I didn't notice, because I was not there all the time.

Q. At what time was the helm put aport—didn't you say your helm was put aport? A. After we struck?

Q. No; before? A. I didn't notice the time.

Q. Was it put aport? A. I couldn't say. I was not attending to the pilot's orders.

Q. Who was in charge of the navigation of that ship? A. The pilot.

Q. Whe gave the orders? A. The pilot.

Q. To whom? A. The man at the wheel.

Q. What did the captain do? A. He may have repeated the orders and seen they were carried out. He was on the bridge.

Q. Who was the lookout? A. What man on lookout?

Q. What man on the lookout? A. The captain and pilot were on the lookout.

Q. Who made reports to the pilots of objects that were seen, whistles, and so on? Did the pilot do that himself? (377) A. It was not necessary. You could see everything from the bridge as well as you could from the forecastle.

Q. The pilot attended to that himself? A. The pilot and the captain.

Q. You saw the collision? A. Yes, sir.

Q. Where were you at the time of the collision? A. On the main deck by the forecastle head.

Q. And was your ship heading then down the channel? A. I couldn't say, because I couldn't see how she was heading when they struck.

Q. You say she was moving backwards? A. Yes, sir.

Q. How did you know that? A. I could see she was going through the water.

Q. And you were on the main deck? A. Yes, sir.

Q. How far from the rail? A. Not very far.

Q. Did not your ship after the collision continue to forge ahead? Didn't the Plymothian go east after the collision? A. Couldn't say, sir. I didn't notice how she went after just previous to the collision.

Q. You didn't see the buoy before she was struck? A. No, sir.

Q. Didn't see it until after she was struck? A. Until after she was struck.

Q. Don't know how long she was under port helm? A. (378) No, sir.

Q. Don't know how long she was moving back? A. Yes, sir; from three to four minutes.

Q. Through the water? A. Yes, sir; from the time the telegraph rang until the collision was about three or four minutes.

Q. Did you actually see her moving back bofore the collision three or four minutes, through the water? A. No, sir.

Q. How long? A. I suppose with the tide about two or three mtnutes.

Q. You think that for two minutes she was moving backwards through the water? A. Yes, sir.

Q. You saw her move back through the water? A. Yes, sir.

Q. Did you see her foul the buoy? A. I didn't notice the buoy.

Q. What orders did you hear given by the pilot to the man at the helm? A. I heard various orders, sir.

Q. Name them? A. As regards moving the helm to port, hard-a-port and steady.

Q. Where was he when he said port? A. Whereabouts, you mean?

Q Yes. Where was the Plymothian when you heard (379) him tell him to port the helm? A. I couldn't say where she was.

Q. Very near? A. You mean before we struck the Victory?

Q. Yes, sir? A. Repeat that question, please.

Q. Were you very near the Victory when you heard the pilot tell the man at the helm to port the helm? A. Not a great way off.

Q. A quarter of a mile? A. Not quite that.

Q. Less? A. A little less.

Q. Then you heard the pilot tell the man to port his helm? A. I didn't hear all the orders.

Q. Did you say that when you were a quarter of a mile off or less you heard the pilot tell the man to port his helm? A. May have been port or hard-a-port. I didn't take particular notice of the orders given to the helmsman.

Q. You heard him tell the man to put his helm to port? A. I heard him say port and also hard-a-port, but when they were given I couldn't say.

Q. You heard hard-a-port? A. Yes, sir; I know that was after, because I went up and saw it.

Q. The order hard-a-port you heard after the collision? (380) A. Yes, sir

Q. And the order to port you heard before the collision? A. I don't know how long it was before.

Q. But you have just stated that it was within a quarter of a mile? A. I didn't take notice of all the orders.

Q. Of course you didn't take notice of all the orders. You have commenced by stating that one of the orders you heard was to port; that is, port the helm, and you said she was not a quarter of a mile off? A. Yes, sir.

Q. And I said, "nearly a quarter of a mile," and you said— A. About a quarter of a mile.

Q. Then, when the Plymothian was distant about a quarter of a mile from the Victory you heard the pilot give the order to the man at the helm to port his helm and did not observe the movement of the boat? A. No, sir.

Q. You went on about your work and didn't notice the movement of your vessel? A. Yes, sir.

Q. And shortly after the collision occurred? A. Yes, sir.

Q. And on the east side of the river? A. Yes, sir.

Q. And shortly after the collision you saw the buoy? A. Yes, sir, shortly after.

Q. Have you any idea that if an order to port had been (381) given when your vessel was a quarter of a mile off, when she was on the eastern side of the river, that a collision could have occurred on the western side of the buoy, wouldn't it have occurred to the east of the buoy while running under port helm? A. Port helm does not mean hard-a-port. It might have been a very little to port.

Q. Did you hear any word but "port"? A. No, sir.

Q. You heard no other order then from the time you heard the order to port? A. O! yes, sir; I heard the order to steady.

Q. Was steady between porting and hard porting? A. Yes, sir.

Q. How long? A. Can't say.

Q. Tell all the orders you heard given? A. I don't know all the orders.

Q. Tell all you heard? A. I didn't take particular notice.

Q. You only took particular notice of this one? A. I heard him say port, and then steady, and then the next order after the Victory struck us was hard-a-port.

Q. How was the helm of the Plymothian at the time of collision? Did you notice it? A. I don't know.

(382) Q. You don't know how it was? A. No, sir. It was not hard-a-port, because I went up after she truck and the pilot sung out to hard-a-port, and I helped put it over.

Q. And it was aport? A. No, sir; I didn't get there until perhaps a minute after the order was given, and then they were putting it over.

Q. Who was directing that navigation, the master or pilot? A. The pilot, I should think.

Q. Did you hear the captain give any orders at all? A. No, sir.

Q. Did you see him do anything, make any reports as lookout? A. I didn't notice. I saw him blowing the whistle.

Q. He was the whistle blower? A. I don't know whether he blew it all the time.

Q. How long before you left Lambert's Point was it that the work was done? When did you finish coaling? A. I think we finished about one o'clock.

Q. What were you waiting for? A. Waiting for the captain to settle his accounts.

Q. Want you waiting for a fireman you wanted to ship? A. Also waited for him; but that did not detain us very long.

Q. Take a drink before you left? A. No, sir; not in the habit of drinking.

Q. See the captain drainking there? A. No, sir.

Q. See the pilot drinking? A. No, sir; I didn't take notice of it; I was on deck.

Examined by Mr. MYNDERSE:

(383) Q. Where were you when the Victory and Plymothian came into collision? A. By the forecastle head, on the main deck.

Q. Did you see the collision? A. I did, sir.

Q. Will you show what angle the vessel came togother at?

Witness prepares diagram, which is hereto annexed, marked exhibit "C."

Q. This is drawn to show about the angle of the collision, according to your recollection, without any reference to the channel line? A. Yes, sir.

RE-EXAMINATION.

By Mr. HUGHES:

Q. You have stated that you heard some orders given by the pilot to the helmsman; but you don't pretend to say you heard all the orders given? A. No, sir, I do not; I didn't hear all the orders.

Q. Nor did you take notice of the exact time of the orders you did hear? A. No, sir; not the exact time.

Q. Did you hear any orders as to the helm given at the time the danger signals were sounded and the engines reversed? A. No, sir.

Q. You didn't notice what orders were given? A. I didn't notice what orders were given; I heard hard-a-port.

(384) Q. That was after the order to port and steady, was it, or before? A. That will be afterwards.

Q. How far distant, in your judgment, was the Victory from your vessel at the time the danger signals were sounded? A. I didn't take any notice.

Q. I just want to get your estimate of the distance? A.

I couldn't say, sir; I didn't take any notice of the distance.

Q. How far ahead did your vessel move after the engines were reversed until the time of the collision before her headway was checked and her sternway began? A. I couldn't say, sir. It would be about a minute and a half or two minutes before our headway was stopped.

Q. You don't know what distance your vessel would move in that time? A. No, sir.

Q. You have been in this harbor, with the ship anchored near the scene of the collision, from the time of the collision up to the present time? A. Yes, sir; we laid there about a fortnight.

Q. And you laid in that immediate vicinity for a fortnight while your vessel was being raised, did you not? A. Yes, sir.

Q. And you have previously been in this port, as you have stated, before the collision? A. Yes, sir.

(385) Q. And it is upon the judgment thus obtained that you have stated that the vessel moved down the river on the eastern side of the channel, is it not? A. I could see which side she went down, and know how the channel went.

Q. I say it was based upon this judgment, thus obtained, that you made that statement? A. Yes, sir.

Q. Did you observe the red buoy on the western side of the channel? A. No, I didn't observe any at all, sir.

By Mr. SHARP:

Q. Where is there a red buoy between Lambert's Point and Craney Island? A. Where is there a red buoy?

Q. Yes, sir? A. I don't know the buoys.

Q. Did you ever see a red buoy between these points? A. Never noticed one. There may be one.

Q. You don't remember having noticed any any time? A. I didn't notice one that day.

Q. Have you seen one since that day? A. Didn't pay particular attention.

Q. How long did you lay down about buoy number 7? A. About a fortnight.

Q. And during all that time you didn't notice any buoy? A. No, sir.

(386) Q. Your habit is not to pay any attention to buoys? A. Oh; yes it is.

Q. But you were so occupied you hadn't time? A. Yes, sir.

Q. About the cotton in this ship, was it damaged in more than one compartment? A. Yes, sir.

Q. How many? A. All the compartments.

Q. How was that; were the gates open? A. No, sir, all closed.

Q How could the water get into the different compartments? A. It couldn't, sir.

Q. Well, how did it get in. Was the ship wounded except opposite one compartment? A. No, sir.

Q. It was wounded in one compartment, and it got into all. Didn't you take steps to prevent its getting into the other compartments? A. Yes, sir, took all necessary steps.

Q. What steps? A. All steps were taken before. After she struck all the doors in the bulkheads were shut down and made tight in the stoke hole.

Q. After the collision? A. That was the only one. That was left open for the engineers to get up the tunnel.

(387) Q. Why did you close it? A. Closed it to keep the water out.

Q. When did you close it? A. After the collision.

Q. How long? A. Immediately after the collision.

Q. If it had been closed before she struck, would the water have gotten into more than one compartment? A. It is hard to say.

Q. Why so? A. I suppose there must be a leak there.

Q. Did the mechanics discover any leak in the ship that caused the water to get into more than one compartment? A. I suppose it went in under the floors.

Q. It is not a good compartment ship, then? A. Supposed to be good.

Q. Is that ship so constructed that when water gets in one compartment it was appliances to keep it from getting into other compartments? A. Supposed to be water-tight.

Q. Was the ship so fixed that day, before the collision, that when water got in one compartment it would keep it out of the others? A. Yes, sir, if the ship didn't go under water.

Q. If the ship got under water wouldn't have that effect? A. It seems so.

Q. How do you account for it? A. The water got under (388) the floors.

Q. But you say you have bulkheads to keep the water from getting into more than one compartment? A. Yes, sir.

Q. Why didn't it do it this time? A. We didn't find out until after that the water was in—

Q. You didn't know until after it occurred? A. The water gradually made its way in.

Q. Was that from a leak in the bottom? A. No, sir.

Q. Where was it? A. In the hold.

Q. How did the leak get into you? A. By the ship running into us.

Q. Was she wounded, then, in other places besides where she was struck? The ship was wounded in more than one place? A. Just there where the Victory struck us.

Q. She was struck in one compartment? A. Yes, sir.

Q. How did it get through into the other compartments? A. I don't know.

Q. You say after the collision you did close the bulkhead? A. I said this one in the engine-room, before the water found its way into the engine-room.

Q. It got in through that door? A. Yes, sir.

Q. Which was open? A. Because it was left open for (389) the engineers.

Q. It was not closed until after the collision? A. Yes, sir.

Q. And if it had been closed— A. It was closed fast enough to make it water tight.

Q. Then it was not a water tight compartment ship? A. Except those two bulkheads.

Q. Which two? A. The one by the stoke-hole door and this other one.

Q. Were they both struck by the Victory? A. Those are the only two that are not water tight compartments.

Mr. SHARP:

Mr. Mynderse, you know more about these water tight boats than I do, but this is about as clear as mud to me. I will have the mechanics on that point.

By Mr. HUGHES:

Q As a matter of fact, Mr. Ham, is it not almost impossible to construct those compartments so *so* as to be water tight when the vessel is submerged? A. I have never seen one yet; I can't say I have ever been in this predicament before, though; but I have never seen one that was water tight yet.

Q. As a matter of fact, there was only one bulkhead open at the time of collision? A. Only one, and that was in the engine-room to allow the engineers to properly see the work, (390) and that was shut to before the water got into the engine-room.

Q. And before the water could get into any other compartment than that in which she was struck? A. Yes, sir.

By Mr. SHARP:

Q. Was much cotton injured in the other compartments? A. Yes, sir; in number two, sir.

Q. As much in number two as in the damaged compartment? A. Yes, sir, I should think so.

Q. How many bales of cotton were damaged? A. 1,528 of the lot were dry, or supposed to be dry.

Q. How many did you have on board? A. 3,682.

Q. About 2,100 bales of cotton were damaged? A. Yes, sir.

Q. How many of those bales were in the compartment that was struck by the Victory? A. I don't know. We didn't keep the bales separate.

Q. About how many? A. I couldn't say.

Q. How many would that compartment hold? A. Possibly might hold from 250 to 300; perhaps more.

Q. Probably hold about 300? A. Somewheres about that.

Q. Then there would be 1,800 bales of cotton that were damaged that were not in that compartment. You state there were 3,600 on board, 1,500 not damged, making 2,100 (391) damaged and 300 in that hold? A. I don't know exact.

Q. You say about 300 bales? A. More or less.

Q. All damaged more or less? A. Yes, sir.

Q. Then, that would leave 1800 bales damaged that were not in the compartment damaged by the collision with the Victory?

By Mr. HUGHES:

Q. Describe the compartment in which the injury was received, and compartment number two in respect to their construction? A. It was one hold, but it was divided off, and the bulkhead, which is wooden, was not taken down.

Q. It is really, then, one hold with a wooden bulkhead? A. Partitioning it off.

Q. And that is the way it has always been since you have been on board the ship? A. That is the way.

Q. It was a bunker compartment, the compartment in which the injury was received, divided off from number two hold? A. We call it a bunker; but, properly speaking, it is one hold.

Q. But it has been divided off for the purpose of receiving coal? A. Yes, sir.

Q. And it was the cotton in that main hold, that is, num- (392) ber two compartment, and this bunker, separated and cut off from it as you have described, in which the cotton that was damaged was stowed? A. Yes, sir. You mean only in that hold?

Q. Yes, sir? A. Oh, no; all the compartments were damaged.

Q. How much cotton was stowed in number two and this

bunker compartment? A. The quantities, you know, we didn't keep separate.

Q. Can't you give any idea? A. I should think there would be somewhere about 1500.

By Mr. SHARP:

Q. How many compartments has the ship? A. Four' with this bunker?

Q. Yes, sir? A. Including this bunker.

Q. Four, including this bunker? A. Four holds.

Q Four holds, counting the bunker as one? A. Counting the bunker as number two.

Q. What is the bunker hold called; number four? A. Just bunker.

Q. Numbers one and three, then, were fore and aft? A. Yes, sir.

Q. And the cotton in each of these was damaged? A. Yes, sir.

Q. And you say the bulkheads were closed between those (393) compartments and the centre compartments? A. Yes, sir. I said the only one that was open was in the engine-room.

Q. How do you know that fact? A. I saw them all closed.

Q. When did you see them closed? A. When we took in cotton in Galveston.

Q. And hadn't looked since you left Galveston? A. I know they were closed, because they are not opened without my orders, and there was no occasion to open them.

Q. In your judgment, then, there is no way to keep a compartment ship free from water when she is submerged? A. No, sir, I didn't say that.

By Mr. MYNDERSE:

Q. After the collision all the cargo was taken out by the salvors? A. Yes, sir.

Q. And that was completed within about two weeks? A. Somewhere about that.

Q. When was the vessel again ready to take cargo? When did she begin to take cargo? A. Friday, December 18th.

ALBERT SCHRODER, the next witness, being duly sworn, (394) deposed as follows:

Examined by Mr. HUGHES:

Q. What is your name, age, residence and occupation? A. Albert Schroder; 45; Cardiff, Wales; steward.

Q. How long have you been to sea? A. Close on to 32 years.

Q. How long have you been on board the Plymothian, and where were you on the 12th of November, 1891? A. I was on board the Plymothian. I have been on her now about seven months.

Q. Please state what occurred and came within your observation, from the time she left the pier at Lambert's Point up to the time at which she struck? A. I was on deck at the time she left the pier at Lambert's Point on the 12th of November, and I saw her get away clear of the pier all right, and I was on the starboard side of number four hatch when we passed number 9 buoy close by.

Q. How close? A. I couldn't say exactly how close; but not very far off.

Q. Was it 50 feet, 100 feet or 100 yards? Just approximate the distance? A. Maybe 50 feet, perhaps.

Q. You were stationed on the starboard side of the number four hatch? A. Number three hatch. Shortly after we got around the buoy and got straightened up I took no-
(395) tice that our whistles were blowing.

Q. Where were you stationed then? A. I was aft then, about the same place. I was walking backwards and forwards.

Q. And you were walking backwards and forwards and heard the whistles? A. I heard two whistles, yes, sir.

Q. Had you heard any whistles before that time? A. No, not that I took any notice of.

Q. I mean from your vessel at the time she left the pier, or afterwards? A. After she left the pier?

Q. At the time she left the pier did you notice any whistles blowing? A. No, sir.

Q. How far after you passed buoy 9 was it when you heard thost whistles? A. Very shortly.

Q. What was that whistle? A. Our whistle, single blast.

Q. How many times? A. Three times I heard distinctly.

Q. You heard that at what interval of time, probably? A. Three-quarters of a minute I suppose, maybe a minute.

Q. Very soon after passing number 9 buoy close aboard, as you say, you heard a single blast; about three-quarters of a minute afterwards you heard another blast, and about
(396) the same distance of time afterwards, you heard another blast? A. Yes, sir.

Q. Did you hear any answers to any of those whistles? A. I didn't notice any answer, and I looked around and could see another steamer coming; I was looking over our

starboard bow a little bit, and I could see she was very quickly coming near us.

Q. Where were you standing, on the port side or the starboard side? A. I was going from one side to the other. I could see her from both sides.

Q. How were you moving down, on which side of the river? A. Close on the buoy side, like, on the starboard side going out.

Q. Your starboard side going out? A. Yes, sir.

Q. That would be the eastern side? A. The same side as the pier.

Q. How was the Victory bearing from your vessel when you heard those whistles sounded on your vessel? A. She was starboarding her helm a little, I believe.

Q. I mean how was she, on your port bow, starboard bow, or dead ahead? A. She was pretty well dead ahead.

Q. Pretty well dead ahead when you first observed her? A. Yes, sir.

(397) Q. How was she with reference to the river? Was she on the west side, the east side, or the middle? A. When I noticed her she was throwing over on the same side we were on.

Q. That was after you heard the three whistles? A. Yes, sir.

Q. When you noticed her coming over to the starboard side of the river? A. Yes, sir.

Q. What other whistles did you hear from your vessel? A. Just a little while before she struck us we blew three blasts in succession, and our vessel was going astern. I could see that by seeing the propeller over the side.

Q. Under what helm was your vessel moving then? A. Ours was on the port helm, going over to the starboard side, more to the buoys.

Q. Did you observe the change at all? A. No, sir; I didn't notice the change at all, but I could see the vessel as she was paying off under port helm.

Q. Do you know how the tide was on that day? A. No, sir; I do not.

Q. How long before the collision was it that those three whistles were blown? Can you estimate the time? A. I should think three or four minutes.

Q. Did you observe the effect on the speed of your vessel under the influence of reversed engines? A. I think it was (398) fully checked.

Q. You think it was fully checked? A. Yes, sir.

Q. Do you think she was making any sternway? A. No sternway; but she had no headway on her.

Q. Did you observe any sailing vessels out in the river?

A. No, sir, never took any notice; but the tugboats came to us afterwards.

Q. How far was buoy number 7 from you when the collision happened? A. Not very far from us.

Q. Well, about how far? How was it with reference to your bow? A. It was first on our starboard bow, and as we were paying off it came around on our port bow; that is, when I noticed it.

Q. It was first on your starboard bow, and as you moved under port helm it came off your port bow? A. Yes, sir.

Q. And was there when the vessels came together, was it? A. I think it was.

Q. And very close aboard? A. Not very far from us. I couldn't say exactly the distance, but not very far from us.

Q. You heard no signal given by this steamer to the first two blown by the Plymothian? A. No, sir; I don't know whether she gave any signals.

(399) Q. You don't whether she gave any signals at all or not? A. No, sir.

Q. But you do know that soon after passing buoy number 9 you did hear a whistle from your steamer, which was twice repeated? A. Yes, sir.

Q. And after a short interval of time three whistles, and the engines were reversed? A. Just before the collision.

Q. And that was three or four minutes before the collision? A. Yes, sir, about that.

Q. You were in position to see, were you, from your position on deck? A. Yes, sir, I was on deck.

Q. You say you heard those whistles; how were they in respect to clearness and distinctness? A. They were plain enough; could hear it a good way off.

Q. Good, clear whistles? A. Yes, sir.

Q. And they were clear and loud, without any steam in it? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You say you were on the starboard side of your boat when you saw the Victory? A. Yes, sir, and I could see her from the other side.

(400) Q. Did you say you saw her from the starboard side? Looking ahead, you mean, you saw her? A. Yes, sir.

Q. Where were you then? A. Aft; just aft the bridge, at number three hatchway.

Q. And being aft you saw the Victory on your starboard side, and after that she starboaded her helm—you say she

came over to the eastern side? A. Yes, sir. I saw her on the port side.

Q. And you say she moved over to the starboard side after you first saw her? A. I don't know whether it was after I first saw her or not.

Q. But you say when you first saw her you were on the starboard side of your ship? A. Yes, sir.

Q. And looking ahead over the starboard side, you saw her? A. Yes, sir.

Q. And afterwards you saw her coming over— A. Looked then to be under starboard helm.

Q. How long was it before you went to the port side? A. Very few seconds I went over again.

Q. And at that time had you passed buoy number 9? A. Oh, yes, sir.

Q. Were you close to buoy 9 at that time? A. Not close to buoy 9 at that time.

Q. How far off? A. I couldn't say how far from number
(401) 9 then.

Q. A quarter of a mile off? A. From number 9 buoy?

Q. Yes, sir? A. Yes, sir; I should think about that.

Q. When you first saw the Victory? A. She was no ways off then.

Q. Exactly; but you were a quarter of a mile off from number 9 buoy when you first saw the Victory? A. I couldn't say a quarter of a mile off, but it was a good ways off.

Q. Well, something less than quarter of a mile? A. Yes, sir.

Q. What was the first whistle you heard from your boat? A. A single blast shortly after we passed number 9 buoy.

Q. That was after you saw the Victory? A. That was when I took notice of her, yes.

Q. You didn't take notice of the Victory— A. I heard the whistles and that made me turn round, and I saw her.

Q. Just when you heard the first signal you looked around from the starboard side of your ship and saw the Victory ahead? A. Yes, sir.

Q. And afterwards went on the port side of the ship and still saw her? A. Yes, sir.

(402) Q. And at that time she was moving over to the eastern side? A. I don't know whether it was the eastern side or not.

Q. You say you saw her moving on the eastern side? A. Yes, sir; paying off towards the buoy.

Q. How long was she heading under that helm? A. I don't know; I was not aboard of her.

Q. Was it five minutes? A. I don't think it was.

Q. Four minutes? A. Yes, sir.

Q. About four minutes? A. I couldn't say for certain.

Q. Three minutes? A. I couldn't say for certain.

Q. As much as two minutes? A. I wouldn't say.

Q. You don't know whether it was one minute, two minutes, three minutes, or four minutes? A. I wouldn't say exact time—one, two, three, or four minutes.

Q. But you are certain when you first saw her you were on the starboard side? A. Yes, sir; I seen her going over on the port side all the time.

Q. Didn't your vessel port her helm? A. I believe she was on her port helm then.

(403) Q. All the time? A. I don't know about all the time.

Q. Did you see her under starboard helm? A. I don't know. Not the day of the collision.

Q. Did you see her move from the wharf under starboard helm? A. I did not.

Q. You saw her head from the pier? A. Yes, sir.

Q. Could she cross buoy 9 from that pier without heading across the channel? A. I don't know exactly how the river is. I couldn't say.

Q. Do you know anything about that channel? A. No, sir.

Q. Do you know anything about the buoy line? Where is buoy 24? A. Don't know.

Q. Buoy 22? A. Don't know.

Q. Where is buoy 7? A. Close where we was sunk.

Q. How far from buoy number 9? A. I couldn't judge the distance.

Q. Think it's a mile? A. No, don't think it is.

Q. How wide is the channel? A. I don't know.

Q. Half a mile wide? A. I don't know.

(404) Q. Then it is half a mile? A. I don't know how far the channel extends.

Q. I want your ideas. Do you think it is half a mile? A. May be half a mile; may be three quarters.

Q. Which do you think it is nearer? A. Three quarters, I think?

Q. And the bank pretty close upon the channel? A. Yes, sir; what I could see of it after we steamed for the bank.

Q. You stayed down their for a long time—two weeks? A. Yes, sir, I believe we did.

Q. You constantly looked at the buoys and the channel itself? A. Did't take much notice after we got there.

Q. Did you take much notice before you there? A. I did when I heard the whistles.

Q. You say the steamer was under port helm nearly all the time. Was she under port helm when she gave the danger signals? A. Yes, sir.

Q. Moving under port helm at that time? A. Yes, sir.

Q. And before that time? A. Yes, sir.

Q. And after that time? A. Of course after that time she was headed to port or we wouldn't have got her ashore.

Q. How many minutes do you suppose was she moving (405) under port helm? Five or ten minutes? A. No.

Q. How long? A. I could say exactly how long; but I should think two or three minutes.

Q. Before the collision, under port helm? A. Yes, sir.

Q. When she was under port helm did you see the Victory—did you see the Victory from the starboard side of your vessel, or the port side? A. From the port.

Q. Then you saw her from the port? A. Yes, sir. She was well over to the starboard side of the channel.

Q. But before you ported you saw her on the starboard side a little? A. Yes, sir, a little.

Q. But after she ported you saw her on the port side? A. Yes, sir. I could see then the collision couldn't be avoided; she was coming at pretty good speed direct at the time.

Q. Did you ever see the Plymothian move backwards through the water? A. I didn't see any sternway.

Q. You didn't hear any whistles from the Victory? A. Didn't take any notice.

Q. Did you notice any schooners? A. No, sir.

(406) Did you take notice of any steamers—river boats? A. No, sir.

By Mr. MYNDERSE:

Q. You saw nothing of any schooners that would interfere with the navigation of the Victory? A. No. If there had been I would have noticed it.

Q. If there had been, you would have noticed them? A. Of course, I was bound to see them.

Q. There was nothing, so far as you could see, to keep the Victory from going over to the other side of the channel? A. Nothing whatever.

Q. Do I understand that when you first saw the Victory she was near dead ahead—you could see her from the starboard bow and the port bow? A. Yes, sir.

By Mr. SHARP:

Q. And you were then on the eastern side? A. Yes, sir.

Q. And after you ported you could see her easier from the port side? A. Yes, sir.

Q. But before you ported your helm you could see her easier from the starboard side? A. I don't know.

Q. I asked you if it was easier to see from the starboard (407) or port side before you ported your helm? A. I don't think there was any difference.

By Mr. HUGHES.

Q. You have stated that just after passing buoy number 9 you heard the first single blast the Plymothian sounded? A. Yes, sir.

Q. And that you then, for the first time, noticed the Victory from the starboard side of your vessel? A. Yes, sir.

Q. And that you were then close to buoy 9? A. Yes, sir; not far from it, just past it.

Q. And not a quarter of a mile off? A. Oh, no.

Q. And that is your distinct recollection? A. Yes, sir.

By Mr. SHARP:

Q. You are sure at the time you first saw the Victory your bow was close to the east side of the river. A. Yes, sir; that she was.

WILLIAM LYONS, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence, and occupation? A. William Lyons; 25; Newark, New Jersey; seaman.

(408) Q. How long have you been aboard the Plymothian, and in what capacity? A. Two months yesterday—the day before yesterday.

Q. And as able seaman? A. Yes sir.

Q. How long have you been following the sea? A. I was fourteen years of age when I went to sea, and I am twenty-five now.

Q. So you have been to sea eleven years? A. Yes, sir.

Q. What duties were you performing on the Plymothian on the afternoon of the 12th of November of this year? A. Steering the vessel, sir.

Q. You were the helsman. Was anyone at the wheel assisting you? A. Yes, sir.

Q. What was his name? A. I don't know his name, sir. I know his first name—John.

Q. Who was on the bridge? A. The captain and pilot, sir.

Q. From whom did you get your orders? A. The pilot, sir.

Q. Just state what orders were given you, as far as you

can recollect, from the time you left the wharf up to the collision? A. When we left the wharf the order given was "port"; when we got out in the middle away it was to
(409) hard-a-port; then the helm was steadied; then the helm was put a-port again, and then the order came "hard-a-port."

Q. And that last order was continued up to the collision? A. Yes, sir.

Q. On which side of the river did your vessel move? A. On the starboard side going down; the east side.

Q. Did you observe buoy number 9, the black buoy, as you passed it; and if so, how close aboard did you pass? A. I don't know the exact distance, but we passed close upon the buoy coming out of the wharf.

Q. On which side did you leave it? A. Starboard side.

Q. Left it close aboard on the starboard side? A. Yes, sir.

Q. Upon passing the buoy what order did you receive from the pilot? A. To port.

Q. You continued that port helm until you got the order hard-a-port? A. Hard-a-port, sir.

Q. Did you hear the whistle of your steamer going? A. Heard two separate whistles, sir.

Q. Of how many blasts? A. I heard three blasts to back the engines.

Q. You heard three separate whistles and then heard three blasts to back the engines? A. Yes, sir.

(410) Q. Did you hear any whistles except those? A. I didn't notice.

Q. Did you hear any whistles as you left the pier? A. Didn't take notice of it.

Q. Did you hear any whistles or salutes sounded upon passing any small boats? A. Didn't take notice.

Q. The only whistles you did observe were two single blasts, which were given previous to the three blasts when the engines were put astern? A. Yes, sir; heard two single blasts and three for astern.

Q. How far apart were those two blasts? Can you approximate the time? A. I should think very near two minutes—between a minute and two minutes. I don't know the exact time, but close to each other.

Q. And then how long after the second single blast you heard was it before the three blasts were given? A. I couldn't say the length of time.

Q. You heard those whistles, did you? A. Yes, sir; heard the three.

Q. You heard the two single blasts and then heard three blasts? A. Yes, sir.

Q. How were they in respect to being loud, clear, and distinct? A. They were clear. I could hear them clear.

(411) Q. Any steam or anything in them to obstruct them? A. They sounded clear to me in the pilot-house.

Q. Describe the pilot-house in respect to the bridge on which the pilots were standing. A. The pilot-house is right here forward on what we call the fiddley deck, and I was standing here on the starboard side, and the speaking-tube comes down from the bridge.

Q. And the bridge is right over the pilot-house with a speaking-tube coming down? A. Yes, sir, comes in on the forward part of the pilot-house, that much distance (marking about two feet) from the man at the wheel.

Q. The pilot-house is enclosed in front with glass, I suppose, is it? A. Yes, sir.

Q. The orders you received were promptly obeyed, were they? A. Yes, sir.

Q. Did you hear any signals given to the other vessel, the Victory? A. Never took any notice of it, sir.

Q. Did you notice how the Victory was bearing from your vessel at the time those two single blasts were given? Was she dead ahead, on the port bow, or on the starboard bow? A. She was about a half or three-quarters of a point on the port bow.

Q. Did you observe her movement after that? A. Yes,

(412) sir, I seen her when we had our helm to port, after we blew the whistle and when I got orders to put the helm to port, and then got orders to put the helm hard-a-port I seen her coming right over to us.

Q. And under what helm was she moving then? A. Looked to me to be starboard helm.

Q. When you received orders to hard port your helm you observed the Victory was then moving under what must have been starboard helm? A. Yes, sir.

Q. Coming across your course? A. Yes, sir.

Q. Did you observe any other vessels in the near proximity to the Victory, so as to obstruct her passage in any way? A. I didn't take notice of them, sir.

Q. You would have observed them if they had been there? A. If they had been between us I would have seen them.

Q. As far as you could see, then, they were not there? A. Yes, sir.

Q. Can you estimate the time that you were moving under your engines reversed—that is, from the time you blew your three blasts and threw your helm hard-a-port, up to the time of collision? A. I couldn't say exactly the time; but it was a little while.

Q. We just want your idea of the time, that is all. You (413) couldn't give any idea of the time, then? A. No, sir.

Q. How far distant was the Victory from you at the time you sounded the three blasts, and put the helm hard aport? A. A good distance.

Q. Was your vessel making headway, or was she stopped or was she making sternway at the time of collision; could you judge? A. I coudn't say if she was making sternway, but she was making no headway. I heard the signals from the bridge to back the engine, but I don't know whether they backed the engines or not.

Q. Your headway was certainly checked, howerer? A. Yes, sir.

Q. How about the speed of the Victory, the other vessel; could you estimate what speed she was making when you sounded the three blasts and at the time of collision? A. At the time of collision I couldn't say exactly her speed; but pretty good speed coming into us.

Q. She was certainly, then, making headway at the time she came into you? A. Yes, sir.

Q. Have you been to this port before and know the channel of this river? A Yes, sir.

Q. From that knowledge and from your recollection of the course that your vessel proceeded on that evening, you could say positively, then, that she proceeded down the (414) east side of the ship channel? A. Yes, sir.

Q. Close aboard buoy number 7? A. Yes, sir.

Q. How close was she to buoy number 7 at the time of collision? A. I couldn't say the exact distance; but the buoy was on the port quarter when we ran her on the beach.

Q. You left her on the port quarter as your vessel ran on the beach? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You say that after the collision when you beached the Plymothian, you left buoy number 7 on your port quarter? A. Yes, sir.

Q. But before you beached her was not the buoy on your starboard bow or side—just before the collision? A. I didn't take notice of the buoy on the starboard side, sir. Q. You don't know whether the collision occurred to the north or south of the buoy or right at the buoy? Was it to the north, south or west of the buoy that the collision occurred? A. It was on this side of the buoy I think, sir.

Q. To the north and west? A. To the north, I think, sir.

Q. Was it somewhat to the west or east of the buoy; you (415) say you know the channel lines? A. Yes. sir, I know the channel, sir.

Q. Was it to the west of the buoy? A. It was right to the north of the buoy.

Q. Well, if it was to the east of the buoy it would be on the flats? A. Be on the flats.

Q. Then, want it to the west of the buoy? A. It happened on this side—on the north of the buoy.

Q. It was on the north side of the buoy, but was not it also on the west side of the buoy—to the northwest of the buoy? You said if it had been on the east it would have been on the flats. A. It was right this side of the buoy.

Q. It was to the north of the buoy, therefore it must have been to the north and west of the buoy; did the collision occur on the buoy itself? A. No. sir; occurred this side of the buoy.

Q. To the north of the buoy? A. Yes, sir.

Q. You say you know the channel; was it to the north or south? Is the north towards old Point? A. Towards Lambert's Point.

Q. You say you know the channel, and you think Lambert's Point is to the north of the buoy? A. Yes, sir.

Q. You say you know the channel; the east side is also (416) upside down, is it? A. No sir; the buoy is on that side.

Q. Upon which side did you see the buoy, upon your starboard side or your port side? A. I didn't take notice of the buoy when steering the ship.

Q. When was the first time you saw the buoy? A. On our port quarter.

Q. After the collision? A. Yes, sir.

Q. Meantime you had changed your movement? A. No, sir; the movement of the ship wouldn't change at all.

Q. Did the boat keep ahead after the collision? A. No, sir.

Q. What did she do? A. She was backing then, and then we steamed up and went on the flats.

Q. And she passed to the south of the buoy? A. Bebetween the buoy and Lambert's Point; between number 9 and number 7.

Q. But before the collision? You say it occurred on the other side of the buoy? A. No, sir; this side.

Q. You think Lambert's Point is to the north of the buoy? A. Yes, sir—well, I don't know.

Q. Do you know which is east and which is west? If

you don't know which is north and which is south, if you know the east side of the river can't you tell which is the (417) north? A. Yes, sir.

Q. If you know which is the east side of the channel, don't you know which is north? A. Yes, sir.

Q. Why, then, did you suppose you were looking north when you were looking at Lambert's Point from the east side of the channel? That is south. Now, if you don't know north from south, how do you know east from west? A. I know north from south and east from west.

Q. And you say Lambert's Point is north of buoy number 7?

A. That is what I was thinking at the time you asked the question.

Q. You have been *think*ing up to this time, all the time, that buoy number 7 was to the south of Lambert's Point? A. Not as I know of, sir.

Q. What did you think? Where did you suppose it was? A. I know the buoys in the channel.

Q. You think it was on the side of the channel? A. On the edge of the channel.

Q. But previous to to-day you thought Lambert's Point was north of buoy number 7, didn't you? A. If you have got a chart *her* I could show you—

Q. Without a chart you can't tell? A. I would like to see the chart and make sure of what I am saying.

Q. Can't you tell without seeing the chart whether Lam- (418) bert's is north or south of that buoy? A. I know north from south and east from west.

Q. Without a chart can you tell east from west? A. Yes, sir; I know where the sun rises and where it sets.

Q. How did the sun rise that day? A. I didn't take notice.

Q. How did it set that day? A. I didn't take notice.

Q. You came in that day and went out that day and didn't notice? A. No, sir.

Q. You had a man helping you that day? A. Yes, sir.

Q. What was he doing? A. Helping put the wheel up or down.

Q. The first order you got was to port your helm? A. Yes, sir.

Q. The next order was hard-a-port? A. Yes, sir..

Q. The next order to steady it? A. Yes, sir.

Q. The next order to port it? A. Yes, sir.

Q. The next order was to put it hard-a-port? A. Yes, sir.

Q. And that was kept up until the collision occurred? A. Yes, sir.

(419) Q. That is from the time you left Lambert's Point pier? A. Yes, sir, I changed the helm four times.

Q. Four times? A. Yes, sir. That is without counting the steadying.

Q. You are positive you changed it four times? A. Four times to port.

Q. Had it been four times to starboard? A. No, sir.

Q. Had it been always to port? A. Yes, sir, it was port, then hard-a-port until we got around the buoy, then steady and then port and then hard-a-port.

Q. How did you steady the helm? A. Give half a turn to starboard.

Q Then you did starboard a little before you got to buoy number 9? A. No, sir, after getting around buoy number 9.

Q. You did, then, starboard *you* helm to some extent? A. To steady the ship.

Q. And you kept under port helm after that? A. After I got the order—

Q. How long was the ship moving with the helm steady? A. Until she blew the first whistle—the first or second, I don't know which.

Q. And that steadying was done under starboard helm? A. No, sir, the helm was amidships.

Q. The ship moving out of Lambert's Point pier, to pass (420) buoy number 9 had to head across the river; didn't she? A. Yes, sir.

Q. She had to head across the river? A. A little on port helm, not right straight across the river.

Q. Obliquely across the river, then, and the first order was port after leaving Lambert's Point pier? A. Yes, sir.

Q. And the next order was to put it hard-a-port? A. Yes, sir.

Q. How was the tide? A. Didn't take notice of the tide.

Q. Didn't the flood tide have great effect on your helm coming out of Lambert's Point? A. It does some times.

Q. Didn't it do it this time? A. I didn't notice.

Q. You made no allowance for the tide, then— A. When I steadied my helm I noticed the buoys—

Q. How did you get your helm steady? A. By starboarding.

Q. It is a fact, then, in coming out of Lambert's Point you first put the helm to port, then hard-a-port and then starboarded it? A. No, sir, steadied it.

Q. But steadied it by starboarding? A. Steadied it by one turn to starboard.

(421) Q. What would be the effect of the flood tide at that point; wouldn't it be to carry your boat across the river? A. I don't know.

Q. But you passed within how many feet of buoy number 9? A. I don't know the exact distance.

Q. 50 feet, did you say? A. No, sir; I didn't say 50 feet.

Q. Then it was 50 feet? A. I don't know.

Q. Very close? A. Yes, sir.

Q. Heading down the river, then? A. Yes, sir.

Q. And from the time you passed buoy 9 didn't you put your helm to port? A. After we got past the buoy we got orders to put the helm to port; after the ship was going steady.

Q. And you are positive of that? A. Yes, sir.

Q. You are certain that as soon as you passed the buoy you got orders to put the helm to port? A. After the first whistle.

Q. And you obeyed the order? A. Yes, sir.

Q. Just as you passed the buoy? A. I don't know about passing it.

Q. Just as you passed buoy number 9? A. We passed
(422) close to buoy number 9.

Q. And just as you were passing the buoy you got an order to port? A. I don't know about just passing. I couldn't come out of the pilot-house and look; it might have been astern of us or by the side of us.

Q. Close to the buoy? A. Yes, sir; just coming around the buoy.

Q. You had just rounded the buoy? A. After we came around the buoy and the helm was steadied, and then I got the order. I don't know whether the buoy was astern or not. It must have been astern.

Q. When the buoy was just astern you got an order to port? A. Yes, sir.

Q. And then the next order was hard-a-port? A. After they blew their whistles.

Q. How long had the ship moved under helm hard-a-port before the collision? A. I couldn't say exactly.

Q. A minute? A. More than a minute.

Q. A minute and a half? A. I don't know; I couldn't give you the exact time.

Q. How long was she moving under port helm before the collision occurred after you stopped steadying her? A. I don't understand you, sir.

Q. After you changed her helm to port from the time it
(423) was steadied, from the time you then commenced to port, how long did that ship continue to move under port helm, four or five minutes A. No, sir.

Q. How long? A. Can't say the exact time sir.

Q. I mean including the time the helm was hard-a-port.

Didn't she move four or five minutes under helm port and hard-a-port, just before the collision? A. Just before the collision she wasn't moving ahead at all, her engines were backing.

Q. And you were at the helm? A. Yes, sir.

Q. And got the order? A. Yes, sir.

Q. And the order was to put the helm hard-a-port just before the collision was likely to occur? A. It was given before that.

Q. Before you thought the collision likely to occur? A. That order was given before she ran into us.

Q. Did you think the collision was going to occur when the order was given to put the helm hard-a-port? A. I didn't know whether it was going to occur or not. She had time to get out of the way.

Q. When the order to port was given did you think the collision was likely to occur? A. No, sir, she was on the port bow then.

(424) Q. And your vessel was heading how? A. Heading right down the river.

Q. Heading down the river? A. Yes, sir.

Q. And when she was on the port bow you got the order to port the helm, just when you could see her from the port side? A. Yes, sir.

Q. Not looking across the port ——? A. Of course I didn't look across the port because there's windows in the pilot house and you can see in any way.

Q. When a vessel is moving in a northeasterly direction towards buoy number 7 wouldn't she see a vessel in the position of the Victory, from the port side? A Yes, sir.

Q. And see her on the port side? A. I was standing on the port side.

Q. Looking over to the port side? A. Looking through the window, sir.

Q. Looking over the port side? A. Yes, sir.

Q. And the vessel was port then? A. Hard-a-port then; but she was a-port when I first seen her; she was right over the port bow, and I gave her two turns of the wheel.

Q. But your boat was moving under port helm at the time you saw the Victory over your port bow? A. Yes, sir.

(425) Q. And your vessel then commenced to move hard-a-port, and you continued to see her over the port bow? A. I couldn't see her then.

Q. Why? A. Because the door was closed then.

Q. The door was closed upon you? A. Not upon me; but we can't open that door. It was cold—

Q. You are positive these are the orders you got—port, hard-a-port, steady—which was done by putting the helm to starboard— A. One turn to starboard.

Q. And then it was put to port, and after that time it was put hard-a-port. How many turns does it take to put it hard-a-port? A. I turn it as far as I can get the wheel.

Q. How many turns? A. Six or seven times.

Q. Six or seven times on that occasion? A. It was hard-a-port, I couldn't tell about six or seven times on that occasion. The helm was hard-a-port, just as hard-a-port as you can get it. When the helm is hard-a-port you can't move the wheel any further.

Q. And you think you made six or seven turns? A. It was fast down.

Q. You think on that day it was six or seven turns? A. I say it will probably take six or seven turns—

(426) Q. How many turns did it take? A. I don't know. It was hard down.

Q. It had previously been somewhat to port—as many as two points? A. I didn't take notice of the compass at all.

Q. Do you think it had been ported as much as to make her two points to the east before that time? A. Yes, sir; a good many more than that.

Q. To the east at that time? A. I don't know whether it was east or not—

Q. How do you account for that vessel not running ashore when you were so close to the bank and your porting and being hard a-port four or five minutes? A. Couldn't go ashore when she was backing.

Q. Does that ship move backward from the time she commences to reverse her engines? A. I don't know whether she will or not.

Q. Do you know any ship that will do it? A. No, I don't think I do; I don't know anything about that.

Q. Have you ever been aboard a steamer before. A. Yes, sir.

Q. As helmsman? A. Yes. sir.

Q. What steamer? A. American steamers.

Q. Have you ever seen any steamer, foreign or American, that would move backward through the water from the time (427) her engines were reversed? A. Never took any notice.

Q. And you have been a good deal to sea in steamers? A. Yes, sir.

Q. And helmsman aboard many steamers? A. Yes, sir.

Q. And never took any notice? A. No, sir.

Q. Was it your idea that that steamer was moving back all the time from the time her engines were reversed? A. Yes, sir; if the engineers tends to the signal it will.

Q. You think if the engineer will promptly obey the order to go back she will go right back through the water? A. I

don't know anything about that. It might take a couple of minutes.

Q. But you have just stated that you don't know whether this boat was going back or not? A. I stated they gave the order to the fire-room to go back; but I stated I did not know whether she was going astern or not.

Q. All you know of this case, then, is that you got the orders you have mentioned, and that after rounding buoy number 9 you put the helm a-port and then hard-a-port before the collision? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. You kept your helm ported until you were headed (428) straight down the river after getting out from the pier? A. Got the order to port the helm when we left the pier.

Q. Then you kept it until you headed straight down the river? A. Kept it a-port until I got the order to steady.

Q And kept it that way until you got straight down the river, and then steadied? A. I steadied when I got the orders.

Q. And you were then heading straight down the river? A. Yes, sir.

Q. And it was after this you ported again for the Victory? A. Yes, sir.

Q. Is your steam whistle the same character as that of other vessels of her class—the same kind of whistle? A. I don't know anything about the whistle.

Q. Is it a loud whistle? A. Yes, sir; blew loud.

Q. Did it blow loud that day? A. Yes, sir.

RE-EXAMINATION.

By Mr. HUGHES:

Q. The effect of putting her helm half a turn or a turn to starboard when a ship is moving under port-helm is not to starboard the helm, but simply to steady the vessel? A. Yes, sir.

Q. And overcomes the movement of the port-helm? A. Yes, sir.

(429) Q. And does not turn her to starboard? A. No, sir.

Q. And that is what you did when you steadied the ship? A. Yes, sir.

Q. You simply threw the helm a turn or a half a turn to starboard to overcome the influence of the port helm? A. Yes, sir.

Q. After you steadied the helm in that way you received

the order to port your helm after the first whistle you heard was sounded? A. Yes, sir.

Q. How much to port? A. Two turns of the wheel.

Q. And that was slightly to port? A. Yes, sir.

Q. It would take six or seven turns to put it hard-a-port? A. Yes, sir.

Q. So you put it only slightly to port? A. Yes, sir.

Q. And continued that until the three blasts were sounded, and you got the order to put it hard-a-port? A. Yes, sir.

Q. (by Mr. SHARP) How far off was the Victory from the Plymothian at the time that you put the helm to port? A. I couldn't say the exact distance, sir.

(430) At 3 o'clock P. M., adjourned until 5 P M.

At 5 o'clock P. M., reassembled, and JOHN HENDEMA, the next witness, deing duly sworn, deposed as follows:

Q. State your name, age, residence, and occupation. A. John Hendema, 36, Amsterdam, seaman.

Q. How long have you been at sea? A. About 20 years.

Q. You are on board the Plymothian as an able seaman? A. Yes, sir.

Q. What were you doing on board the Plymothian on the evening of the 12th day of November last? A. On the watch—one thing and another, sir; clearing up things and getting ready for sea.

Q. What were your duties from the time she left the pier up to the time of the collision? What was your station? A. At the wheel then, sir. Lyons was at the wheel and I stood by and gave him a hand.

Q. At what side of the wheel did you stand? A. On the port side, sir.

Q. Standing in that position did you hear the orders given by the pilot to Lyons? A. Yes, sir.

Q. Were those orders promptly obeyed as given to Lyons? A. Yes, sir.

Q. Just state what orders you heard upon leaving the pier and up to the time of collision, and how they were given. A. We left the wharf under port helm, sir; after we got some distance away, hard-a-port.

(431) Q. Then what was the next order? A. Then we heard some whistles blow and steadied the helm.

Q. You say you heard some whistles blown. Do you know what they were blown to? A. No, sir; I didn't take any notice.

Q. Then when you steadied a little while what was the next order? A. Port, again, sir.

Q. Then what was the next order? A. Hard-a-port, sir.

Q. So that the last order given— Did she continue under hard-a-port helm up to the time of collision? A. Yes, sir

Q. Then, as I understand, you left the pier under port helm; you then put the helm hard-a-port; then steadied; then you put the helm slightly to port, and then you put the helm hard-a-port? Q. Yes, sir.

Q. And you continued under that helm until the vessels came together? A. Yes, sir; close to a buoy on the starboard side.

Q. Close to buoy number 7, on the starboard side? A. Yes, sir; number 7 buoy.

Q. Which was right under your starboard bow at the time of collision? A. I could see the buoy a little forward on the starboard bow, sir.

Q. Did you notice the first buoy you passed, buoy num-
(432) ber 9? A. No, sir; never took any notice of the number; heard after it was buoy 9.

Q. You saw the buoy. A. Yes, sir, saw the buoy.

Q. But don't know the number? A. No, sir.

Q. How close to that buoy did you come? A. Well, by my guess, sir, I think about 50 feet.

Q. And on what side did you leave it? A. The buoy?

Q. Yes, sir; the starboard or the port side? A. Starboard side, sir.

Q. You passed the buoy on the star-board side, about 50 feet off? A Yes, sir.

Q. Did you hear the whistles of your steamer given? A. Yes, sir.

Q. How were they in respect to being loud and clear? A. The whistles were all right. They tried them before they left the pier, sir; tried the whistles.

Q. And you heard them during this voyage down the river blow several times? A. Several times; and I saw the steamboat just like this, sir, going just this way, and I says, if she goes this way she will strike us, and Lyons said—

Q. We don't want what Lyons said. We just want you to testify as to what happened, the facts. Did you hear any
(433) single blasts of your whistle sounded? A. Yes, sir.

Q. How many? A. Three, close to the other.

Q. Then what did you hear? A. Afterwards she blew three quick after another, sir.

Q. And was that at the time you put the helm hard-a-port? A. Yes, sir.

Q. Did you hear the telegraph to the engine room ring then? A. No, sir, can't say that.

Q. You don't know what order was rung to the engine room, but only heard those three whistles and the helm put hard a-port? A. Yes, sir.

Q. How far off was the Victory at that time, and how was she coming? A. Well, by my guess, about a point or a point and a quarter, one of the other.

Q. On what bow? A. On the port bow.

Q Under what helm was she coming then? A. I couldn't tell you that, sir; we could see the head, sir, but couldn't see the stern.

Q. You couldn't tell, of course, how the helm actually was; but couldn't you judge how the vessel was moving? A. No, sir, I couldn't tell.

Q. You couldn't tell how the helm was from the way she was coming towards you? A. No, sir.

(434) CROSS-EXAMINATION.

By Mr. SHARP:

Q. Why did you have two men at the wheel? A. All the time do that out and in port.

Q. Do you do it on other vessels? A. Some vessels.

Q. How many? A. I couldn't tell. I have been a couple of years in Belgian steamboats, and they have always got two men at the helm.

Q. Is the steering machinery worked by steam? A. Yes, sir.

Q. And it took two men at the helm to turn it over? A. Yes, sir.

Q. Did you come up from Galveston with her? A. Yes, sir.

Q. Did you have two men at the helm all the way up from Texas? A. Yes, sir.

Q. All the way? A. Yes, sir, in the river.

Q. When you were in the ocean? A. One man at the helm, it was.

Q. One on the ocean and two inside the shores? A. Yes, sir.

Q. Did you hear the orders given by the pilot to Lyons at the helm? A. Yes, sir.

Q. Did the master give any orders? A. Yes, sir.

(435) Q. What were they? A. Port, sir.

Q. The master gave that order? A. Yes, sir.

Q. At what time? A. When she left the wharf, sir.

Q. What is the next order the master gave? A. Hard-a-port, sir.

Q. The master gave that order? A. Yes, sir.

Q. What is the next he gave? A. Steady the helm.

Q. What is the next he gave? A. Turn to starboard to steady the vessel.

Q. Who gave the orders to port and hard-port after that? A. The pilot, sir; the pilot always gave the orders.

Q. Didn't you say the master gave the orders? A. Yes, sir.

Q. The master gave the orders, as I understand, before the helm was steadied, and the pilot afterwards? A. No, sir, no, sir, the pilot always gave the orders.

Q. Did you hear the master make any report as lookout, to the pilot, reporting any vessels or whistles or signals? A. Couldn't tell you that, sir.

Q. You never heard the master have any conversation with the pilot? A. No, sir.

(436) Q. None at all? A. No, sir.

Q. Nor make any remark to him? A. No, sir.

Q. Or make any report to him? A. No, sir.

Q. Who was acting as lookout of that ship? A. The captain and pilot was on the bridge together.

Q. Which one, the master or the pilot? A. Both of them.

Q. So the master didn't make any report to the pilot, the pilot saw for himself? A. I don't know. I couldn't tell you that.

Q. There was no talk between the master and the pilot? A. No, sir.

Q. The pilot was attending to the navigation of the ship? A. Yes, sir.

Q. And not the master? A. Yes, sir.

Q. The master did nothing? A. He was walking on the bridge and lookout.

Q. What else did he do besides lookout? A. I couldn't tell you that, sir.

Q. He made no report that you heard? A. No, sir.

Q. Now let's come down to these orders. The first order on leaving Lambert's Point was to port the helm? A. Yes, (437) sir.

Q. How long had you gone under that order before you got the next order? Had you reached buoy 9 before you got the order to hard-a-port? A. It was first port, then hard-a-port, then steady the helm.

Q. Don't go so fast. Had the Plymothian reached buoy number 9 before the second order came to put the helm hard-a-port? A. Yes, sir.

Q. She had reached that point? A. Yes, sir.

Q. Then she got the orders after passing buoy number 9 to put the helm hard-a-port? A. Yes, sir.

Q. And the first order to put the helm a-port was between

Lambert's Point and buoy number 9? A. I don't know the name of the places.

Q. The first black buoy to Lambert's Point is number 9. Was any order given by the master or pilot to Lyons at the helm, or to you, before passing buoy number 9, except the order to port the helm? A. It was first port the helm and then hard-a-port.

Q. That was before you passed buoy number 9? A. Yes, sir; and then steady the helm.

Q. I understand that; don't be so quick. You say two orders were given before the Plymothian passed buoy num-
(438) ber 9; the first order was to port the helm? A. Yes, sir.

Q. The second order was to hard-a-port? A. Yes, sir.

Q. And each of those was before you passed the black buoy? A. Yes, sir.

Q. And when the Plymothian passed that buoy did she pass under helm hard-a-port? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Where was she when the order was given to steady; had she passed buoy number 9? A. Before.

Q. Before she passed buoy number 9? A. Yes, sir.

Q. You are certain of that? A. Yes, sir.

Q. The three first orders, then, to put the helm a-port, hard-a-port, and steady, were before she passed buoy 9? A. After that, sir, yes.

Q. Were they given before she passed buoy 9? Where was the Plymothian when the order to steady her was given? Was it before she passed buoy 9? A. Yes, sir.

Q. Before she passed that black buoy? A. Yes, sir.

Q. And she moved under that helm for some time. A.
(439) Yes, sir.

Q. The helm was amidships, then, when she was passing buoy 9? A. Before that, sir; we passed the buoy under port-helm.

Q. Was her helm steadied before or after passing that black buoy? A. Before.

Q. And after it was steadied it was put— A. A-port, sir, and afterwards hard-a-port.

Q. But the first was port, next hard-a-port, next steady, next port and next hard-a-port? A. Yes, sir.

Q. Where was the ship when that last order was given? A. Close to number 7 buoy.

Q. When the last order was given? A. Yes, sir.

Q. I will come back to the beginning again. You know where the black buoy is? A. Yes, sir.

Q. Did you hear the order given by the pilot to the man at the wheel to port the helm before she passed that buoy? A. Number 9; yes, sir.

Q. Did you hear the order given by the pilot to the man at the helm to put the helm hard-a-port before you passed that buoy? A. Yes, sir.

Q. Did you hear the order from the master or pilot to steady the helm before the Plymothian passed buoy number (440) 9? A. From the pilot.

Q. Are you sure of that? A. Yes, sir.

Q. All three of those orders were given. Were they obeyed by the man at the wheel? A. I don't understand, sir.

Q. Before you passed buoy number 9 did Lyons port his wheel? A. Yes, sir.

Q. Did he put it hard-a-port? A. Yes, sir—not hard-a-port, and after we passed the buoy it was hard-a-port.

Q. Before you passed buoy number 9 do you know the fact that Lyons steadied his helm? A. Yes, sir.

Q. Before you passed buoy 9? Yes, sir.

Q. That is one thing you do know, that before the Plymothian passed buoy 9 Lyons steadied the helm? A. Yes, sir.

Q. That you know? A. Yes, sir.

Q. And after that it was put hard-a-port? A. Yes, sir, ported again.

Q. And after that it was ported? How could you port after it was hard-a-port? A. No, sir.

(441) Q. How many times was it put hard-a-port? A. Two.

Q. Where was it done first? A. Before we came to number 9 buoy, and close to number 7 buoy.

Q. You put the helm hard-a-port before you passed buoy 9, and afterwards did it again before the collision, shortly before reaching buoy number 7? A. Yes, sir.

Q. And you steadied only once? A. Yes, sir.

Q. And that was before you passed buoy number 9? A. Yes, sir.

Q. And that was between the porting and hard-porting, or after the hard-porting? A. After the hard-porting.

Q. How long did the ship move with helm amidships? How many minutes? A. I couldn't tell you, sir.

Q. Five minutes? A. No, sir, I think not.

Q. Three minutes? A. About three or four minutes; I couldn't tell you exactly; I didn't take no notice of that.

Q. She commenced that before passing buoy number 9 and kept on after passing buoy 9, is that so? A. No, sir.

(442) Q. Didn't she pass number 9 buoy? A. Yes, sir.

Q. You say she commenced before she passed the buoy? A. Yes, sir.

Q. And was at it for three minutes, so she must have

had her helm steady after passing the buoy? A. Just a little distance; and you see the boat is coming around, sir.

Q. During the three minutes she was moving with the helm amidships, wasn't part of that before she passed buoy number 9, and part of it after she passed buoy number 9? A. I couldn't be sure of that. Close to the buoy we got the helm port again.

Q. Did you put the helm hard-a-port after passing buoy 9? A. No, sir, ported it.

Q. Directly after passing buoy 9? A. I couldn't tell you, sir. Just before we were passing—

Q. What do you know? Just tell something you know; you contradict yourself every minute. After passing number 9 buoy did you put your helm a-port or hard-a-port? A. A-port, sir.

Q. Just after passing? A. Yes, sir.

Q. And before that time you steaded the helm? A. Yes, sir.

Q. You don't want to correct that statement, do you? Is that a fact or not? A. Yes, sir.

(443) Q. Now you say that just before the collision you saw the buoy on your starboard bow—buoy number 7? A. Yes, sir.

Q. You are positive of that, are you? A. Yes, sir.

Q. After the collision, when the Plymothian moved over to the shore to beach her, didn't you see that buoy on your port side? A. No, sir.

Q. Was it on the starboard side still? A. Yes, sir.

Q. The Plymothian, then passed that buoy on her port side? A. No, sir.

Q. Passed on the starboard side? A. Yes, sir.

Q. Where is buoy number 24? A. I couldn't tell you, sir.

Q. Do you know any of the red buoys in that river? A. No, sir, this is the first time I have been here.

Q. Did you see any red buoy in that river? A. Yes, sir.

Q. How long were you down there after the collision? A. About 12 or 13 days.

Q. And during all those days you never saw a red buoy? A. Yes, sir, I remember I seen a red buoy.

Q. What is the width of the channel, is it a mile or half (444) a mile? A. I guess I would call it half a mile, sir.

Q. Nothing less than that? A. Not more than that.

Q. How many miles is it from Craney Island to Lambert's Point? A. Couldn't tell you that, sir.

Q. How many do you think? A. I don't know where Craney Island is.

Q. Don't you know where Craney Island light-house is? A. Yes, sir' could see the lighthouse.

Q. How far is that from Lambert's Point? A. Couldn't tell you, sir, took no notice of that.

Q. Not in the 12 days you were there; what is it you found out when you were down there; anything at all? Tell me all you learned down there at buoy number number 7—what did you find out down there? Is it 15 miles from Craney Island to Lambert's Point? A. No,sir.

Q. Three miles? A. I should say not, sir.

Q. How far? A. About two miles.

Q. How far to the north of buoy number 7 is Lambert's Point? A. To the north?

Q. Yes, of buoy number 7 is Lambert's Point? A. Don't know that, sir.

Q. Which is it, north or south? A. Well, I couldn't tell (445) you. I don't know the river here. Whether we were going west or east, or north or south, I couldn't tell you.

Q. You know nothing about this river? A. No, sir.

Q. How long does it take your boat to move backwards through the water after the engines are reversed? A. I can tell you nothing about the engines.

Q. You know nothing about the engines? A. No, sir.

Q. Was your boat moving a mile an hour at the time of collision, or two miles an hour? A. No, sir.

Q How fast was she moving? A Might have gone a little ahead, but I couldn't tell you how much.

Q. A mile an hour? A. No, sir, I don't think.

Q. Going ahead? A. Yes, sir.

Q. Did you look out to see? A. Yes, sir; saw the buoy there.

Q. And saw she was moving towards the buoy? A. That's all I could tell you, sir.

Q. You looked out of the pilot-house and saw she was moving ahead just before the collision? A. Yes, sir.

Q. About how fast? You can't tell? A. Yes, sir.

(446) Q. How was the Victory heading at the time of collision?

The witness here draws a diagram showing the relative position of the two steamers, which is annexed to this record marked exhibit "D."

Q. This is the Victory coming up towards Lambert's Point. Was the Victory heading over towards the west or east side of the river? A. I couldn't tell you how the river is. Is the starboard side east or west?

Q. The starboard side going down is east. How was the Victory heading then? A. East, sir.

Q. Was the Plymothian heading to the west or east? A. To the east, sir, and the other boat came up—you told me the starboard side was east—then to the east.

Q. Both heading east? A. Yes, sir; close to the black buoy.

Q. What was the second officer of your ship doing? Where was he stationed? A. Couldn't tell you, sir.

Q. Where was the third officer stationed? A. Got no third officer.

Q. The ship has two officers besides the master? A. Yes, sir; master, chief officer, and second officer.

Q. You were doing the work of the third officer, were you not? A. No, sir.

(447) Q. Lyons was? Is it not the practice, going out of port, for the third officer to take the helm? A. No, sir; that goes by the turn of the wheel. My wheel is from 2 to 4 o'clock, and it was a little after four when we left the wharf.

Q. How long did you say the ship was moving under helm amidships? Two or three minutes, you say? A. About, sir.

Examined by Mr. MYNDERSE:

Q. While your helm was amidships you were heading down the channel towards the light-house? A. I didn't see the light-house.

Q. Did you see Craney Island light-house? A. Didn't see the island at all, sir.

Q. Were you heading down towards buoy 7, down the the channel, at the time her helm was steadied? A. We was above number 9, sir

Q. Want you past number 9? Were you heading down the channel at the time? A. That is a question I don't know.

Q. You say you passed buoy number 9 about 50 feet off? A. Yes, sir.

Q. And at that time you were steady? Your helm was steadied? A. Before; yes, sir.

Q. And was steady at that time? Was amidships, and was amidships about three minutes? A. About; yes, sir.

(448) Q. And was it still amidships when you first saw the Victory? A. Before we seen the victory we was around the buoy, sir.

Q. And your helm was steadied when you passed buoy 9? A. Yes, sir.

Q. And you kept it steadied for two or three minutes? A. Yes, sir.

Q. And it was still amidships when you first saw the Victory? A. What did you say, sir?

Q. Did you see the Victory before the collision? A. Yes, sir; when we came around the buoy, like this, we saw the Victory.

Q. As soon as you came around the buoy you saw the Victory? A. Yes, sir.

Q. And the helm was steady at that time, and remained steady for two or three minutes? A. Yes, sir.

Q. And you had seen her as soon as you passed the buoy? A. Yes, sir.

Q. And which way was she from you? Ahead of you? A. Yes, sir.

Q. And you kept on, then, steady for two or three minutes—you kept on with helm amidships? A. That was before we came around the 9 buoy, sir; you are talking now—

Q. Go slow. You steadied your helm before you passed the buoy? A. Yes, sir.

(449) Q. And then when you got down by the buoy your helm was still amidships? A. Buoy 9.

Q. And you then saw the Victory off ahead of you? A. Yes, sir, when we got around the buoy.

Q. And you continued with helm amidships for two or three minutes, and then ported the helm? A. Yes, sir.

Q. And after porting a little you blew three blasts all together and hard-ported? A. Yes, sir; that is, the orders for hard-a-port, and then heard the whistles, sir; that is, the three whistles.

Q. You hard-ported at the time you blew three whistles all together? A. Yes, sir.

RE-EXAMINATION.

By Mr. HUGHES:

Q. And you had previously blown three blasts at short intervals? A. Yes, sir.

Q. How far past the buoy were you when you ported your helm before it was put hard-a-port? A. Number 7 buoy.

Q. No; number 9 buoy? A. You ask me want it a-port a little when we came to number 9 buoy.

(450) Q. How long after you passed the buoy before you ported a little? A. Before we came around the buoy we got it steady.

Q. How was your helm when you passed the buoy? A. Then got it a-port.

Q. The helm was a-port when you passed the buoy? A. Yes, sir.

Q. You had just previously steadied your helm, and as you passed the buoy the helm was ported? A. Yes, sir.

Q. And you passed buoy 9 under port helm? A. Yes, sir.

Q. Then you sounded those three whistles of a single blast each? A. Three times, around the buoy.

Q. And then the three blasts together, the danger signal, and the helm was put hard-a-port? A. Yes, sir.

Q. Could you see Captain Mardon from where you were standing on the bridge? A. No, sir; we were in the house.

Q. You were standing right under him, with the bridge over you, on the roof of the pilot-house? A. Yes, sir.

Q. Couldn't see him at all? A. No, sir.

Q. Don't know what he said to the pilot or anything (451) about it? A. No, sir.

Q. And that is what you mean in your cross-examination that you don't know what he was doing; you didn't see him do anything? A. No, sir.

Q. Did you see the buoy number 7 when you were going to beach the steamer on the flats after the collision? A. Yes, sir. On the flats? what, you mean—

Q. On the shore. After the collision you rang the engines up and went off underport helm to the east side of the river to put her on the shore. Which side of that buoy did you pass; did you leave it on the port side or the starboard side? A. When we came around the buoy? We got it on the port side after the collision, and then ran aground.

Q. After the collision you passed the buoy on the port side, and went off and beached your vessel on the eastern bank of the river? A. Yes, sir.

Q. And just before the collision you saw the buoy right off your starboard bow? A. Yes, sir.

Q. And after the collision you passed it on your port side? A. That's right, sir.

Q. How long before the collision was it when you noticed your vessel was going ahead? A. Could see that on the bow, sir.

(452) How long was that before the collision? A. A good distance, and I told Lyons he would come clear of us—

Q. When the ships came into collision was your vessel making stern way, or was she still, or was she going ahead? A. I couldn't tell you that, sir. I could see the buoy astern after she was going ahead; but I couldn't tell you anything about the stern way.

Q. You couldn't tell whether she was making stern way or not? A. No, sir.

Q. Was she going ahead or not? A. Yes, sir, going ahead.

Q. You think making a little headway at the time of collision? A. Yes, sir.

By Mr. SHARP:

Q. You have stated many times to-day that the Plymothian steadied her helm before she reached, or passed, buoy 9. Is that true? A. Only once steadied her helm.

Q. She steadied it before she came up to buoy 9? A. Yes, sir.

Q. And that she kept that helm amidships two or three minutes that time? A. Yes, sir.

Q. And that her helm was amidships when she was pass-
(453) ing buoy number 9? A Yes, sir.

Q. You have no doubt of that? A. Yes, sir.

Q. You have no doubt of that, that it is true? A. Yes, sir.

By Mr. HUGHES:

Q. You have just stated to me, however, that when you passed buoy number 9 your helm was a-port, which is it? A. What?

Q. You stated that you came to that buoy with helm amidships and— A. We came up to the buoy steadied, and when we passed the buoy we ported it, and afterwards it was hard-a-port.

CHARLES BAIRD, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. Charles Baird; 34; Cardiff; seaman.

Q. How long have you been at sea, and what is your position on the Plymothian, and how long have you been there? A. Between 16 and 17 years; able seaman; about three months and twenty days, to-day, sir.

(454) Q. Where were you standing and what were you doing from the time the Plymothian left Lambert's Point pier up to the time the collision happened on the 12th of November? A. I was on the after hatch coiling down rope.

Q. Coiling ropes on the after hatch. Is that hatch number 4? A. Yes, sir.

Q. Standing on that hatch as you were, did you have a view of the objects ahead of your vessel? A. Yes, sir.

Q. Did you see the black buoy just after leaving Lambert's Point? A. Yes, sir.

Q. How close did your ship pass to that buoy? A. I dare say a matter of about 40 or 50 feet.

Q. Leaving it on which side? A. Starboard side—perhaps closer.

Q. Passed close to number 9 buoy, leaving it about 40 or 50 feet on the starboard side? A. Yes, sir.

Q. How did she proceed down the river after passing that buoy—on which side? A. Starboard side.

Q. Well over on the starboard side, or how? A. Well over on the starboard side.

Q. Did you notice a red buoy over on the port side? A. No, sir.

Q. Did you hear the whistles sounded from your steamer (455) that day? A. Yes, sir.

Q. How were they in respect to being loud, clear and distinct? A I heard them three times.

Q. How was it in respect to sound? A. Clear sound, sir.

Q. Nothing the matter with it? A. No, sir.

Q. What whistles did you hear? A. I heard three single whistles blown.

Q. Did you hear any others? A. Only the three for astern.

Q. Then you heard three to go astern? A. Yes, sir.

Q. They were given to go astern? A. Yes, sir.

Q. And you had previously heard three blasts given at about what interval? About a minute.

Q. Given about a minute apart you think? A. Yes, sir.

Q. Did you see the steamer Victory? A. Yes, sir, on the port bow, sir; just a shade on the port bow.

Q. Had you passed the buoy when *the* first observed her? A. Yes, sir.

Q. And she was then just a shade on the port bow? A. (456) Yes, sir.

Q. You were then moving down on the starboard side of the channel? A. Yes, sir.

Q. And she was on your port bow? A. Yes, sir.

Q. Was that just after you heard the single whistles? A. Yes, sir, just after.

Q. What speed was your vessel making, or can you estimate? A. Couldn't tell you, sir.

Q. Was she going rapidly or slowly? A. She was going about ordinary. I couldn't tell whether she was going full speed or slow.

Q. You didn't notice whether she was going full speed or slow? A. No, sir.

Q. Then you heard that single blast repeated twice, making three times altogether? A. Yes, sir.

Q. Did you observe the Victory during that time? A. Yes, sir.

Q. Did you hear any answers, or was there any answer? A. I saw answers but couldn't tell what they were.

Q. When did you see them? A. After the second whistle.

Q. You don't know what that was? A. No, sir, don't know how many whistles was blown.

Q. Do you know whether she blew at all or not? A. (457) Yes, sir, she blew something; but I couldn't tell you what, sir.

Q. Did you observe her as the vessels continued to approach each other? A. Yes, sir.

Q. Just describe how she came up to you, and at what speed? A. I thought she was going to strike us just about the fore-rigging.

Q. How did she appear to be moving? A. Appeared to be moving under starboard helm; didn't keep away from us at all.

Q. She appeared to you to be moving under starboard helm, approaching your vessel, and never under port helm to avoid you? A. No, sir.

Q. What speed was she making? A. Making decided speed when she came into us.

Q. Had she been going rapidly before that? A. Yes, sir.

Q. How was your vessel at the time the collision occurred, was she making head way, stern way or was she still. A. Still Her headway was checked before she struck.

Q. You are certain of that? A. Yes, sir; I was looking over the rail then, sir.

Q. On which side? A. Port side, sir.

Q. Did you observe the buoy near which the accident (458) happened, or how far you were from that buoy when the vessels came together? A. We were this side of it.

Q. You mean toward's Lambert's Point? A. Towards buoy 9.

Q. That's south of it. Wouldn't— A. I don't know.

Q. You don't know whether the river runs north or south? A. No, sir.

Q. You only know you kept to starboard in moving down? A. Yes, sir.

Q. Suppose the river runs north and you were going in a northerly direction, going down, the collision occurred just south of the buoy? A. Yes, sir.

Q. Did you have a good view of the river from the hatch

on which you were standing, or from your position at the rail on the port side? A. I could see then, sir.

Q. Did you observe any sailing vessels or any other vessels out there? A. No, sir; only kept my eyes on the Victory.

Q. If anything had been there you would have seen it? A. Yes, sir.

Q. And you saw nothing to obstruct her moving under port helm? A. No, sir.

(459) Q. The channel seemed to be clear, as far as you could see? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You say you were coiling rope on the after part of the boat? A. Yes, sir.

Q. On what deck? A. After deck.

Q. What is ahead of that, the smoke-stack? A. Yes, sir, and the upper deck.

Q. Can you see straight ahead, or does the bridge obstruct it? A. No, sir; there is an alley way between the lower and upper deck.

Q. How were you standing; looking towards the head or the stern of the ship? A. I was walking around.

Q. You were looking around on the country while coiling the rope? A. Yes, sir.

Q. You were coiling it to the time of collision? A. From the time we left the wharf.

Q. You were coiling rope from the time you left the wharf until just before the collision occurred? A. Yes, sir; when I heard the second whistle I stood up.

(460) Q. How far off was she then? A. A good distance.

Q. Half a mile? A. Yes, sir, if not more.

Q. Why did you stop if she was half a mile off? Did you expect a collision? A. I couldn't tell whether it was half a mile off; you can't tell on water. I—

Q. Was it a quarter of a mile? A. I know it was a tidy distance.

Q. A hundred yards? A. Oh, yes, sir.

Q. Two hundred? A. Yes, sir; she was between a quarter and a half a mile.

Q. You say you were not looking out for schooners, you were looking at the Victory? A. Yes, sir.

Q. You didn't see any other vessel? A. No, sir.

Q. Did you notice any river steamers passing down? A. No, sir.

Q. Did you ever see a red buoy in that river? A. No, sir.

Q. How long were you down there after the collision? A. About eleven or twelve days.

Q. And never saw any red buoys in that time? A. I never took notice.

(461) Q. Do you know anything about that channel as defined by the buoys? A. No, sir.

Q. Do you think it is half a mile wide? A. Yes, at least that.

Q. A mile wide? A. No, sir; it is half a mile at least.

Q. Do you regard the channel in reference to the shores or the buoys? A. To the buoys.

Q. Did you, when you were looking out there, suppose the vessel was on the east or west side of the river, having in view the banks or the buoys? A. I was looking at the buoys, the buoys on the starboard hand, and judging for myself.

Q. Were you judging from the banks or from the buoys? A. From the buoys.

Q. But you have just stated that you didn't see the buoys on the west side of the river at all? A. There was a light-house just up ahead of us, sir.

Q. How far was the light-house from the collision? A. Away on our port hand.

Q. How far do you think the light-house was from the collision? A. Couldn't tell you, sir.

Q. But you say you never saw a buoy on the western side, you saw the light-house? A. Not to my knowledge.

(462) Q. You formed no judgment of the channel by the buoys, except that you saw a buoy on the eastern side of the river? A. Yes, sir..

Q. Do you suppose it was a channel all the way across to the west shore? A. Not to the west shore, sir.

Q. Near to it? Do you think the channel was near the west shore? A. No, sir.

Q. How far did you suppose the west shore was from the channel line? A. Couldn't tell you how far it was.

Q. How often have you been in this port before? A. This is the first time.

Q. You really don't know anything about this channel? A. No, sir.

Q. You don't know whether a vessel is on the west side or on the east? A. I know we were on the starboard side going down.

Q. You mean the collision was on the starboard side? A. The ship came into our port side.

Q. But the collision was on the starboard side? A. Yes, sir.

Q. And you think because the collision was on the starboard side of the river that you were moving down the starboard side of the river? A. I don't know the north from the south.

(463) Q. Lambert's Point is south; you were going north. Did you suppose you were moving on the eastern side of the channel because the collision occurred on the eastern side of the river? A. Yes, sir, I am certain—.

Q. And that influences you to judge it? A. Yes, sir.

Q. And did you have any other reason in the world to suppose you were on the eastern side and moving down the eastern side, except that the collision occurred on the eastern side? A. Yes, sir.

Q. You don't know anything about the channel? A. No, sir.

Q. And you think because the collision occurred on the eastern side that you were moving down the eastern [illegible]? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. You saw the buoys on the starboard side? A. Yes, sir.

Q. And you saw the light-house ahead on the port side? A. Yes, sir.

Q. And you saw the line of buoys on the starboard side and you kept down along that starboard line of buoys? A. Yes, sir.

Q. You say you passed buoy number 9, the black one (464) near Lambert's Point, and left it 40 or 50 feet on the starboard side? A. Yes, sir.

Q. Then you kept right on down the channel on that side? A. Yes, sir, on that side.

Q. And you saw the Victory a shade on your port bow when you first saw her? A. Yes, sir.

Q. Was that shortly after you passed buoy 9, when you first saw the Victory? A. Yes, sir.

By Mr. SHARP:

Q. Now you say you judge you were on the east side of the channel by the buoy line? A. Yes, sir.

Q. You say you passed close to buoy 9 and the collision occurred close to buoy 7? A. Yes, sir.

Q. And you passed between those buoys on the east side of the river. Suppose your helm had been ported and hard-ported, could you have kept off the bank if you had gone down the east side of the river? You are a seaman ain't you? A. Yes, sir.

Q. Do you believe such a thing as that is possible? A. What?

(465) Q. That a boat can go down the east side of the river and pass one buoy and go to another buoy and put her helm a-port and hard-a-port, and that she could keep off the bank? A. I couldn't tell you.

Q. What do you think? A. I don't know. I was not at the wheel.

Q. Unless you are at the wheel you can't tell whether a ship will go ashore if she is on the eastern side? Suppose the helm is put hard-a-port, will that take her ashore? A. If they drive ahead it will.

Q. If she is going under helm hard-a-port it will take her ashore? A. No, sir.

Q. What will she do? A. Keep down the channel.

Q. Do you believe a boat can leave buoy number 9 and keep to buoy 7 with the helm a-port and hard-a-port and not go ashore? You have been to sea more than a year? A. 16 or 17 years.

Q. And you believe that could happen? A. Not believing nothing at all about it. I don't know anything at all about it. I am believing that a ship is conducted in a proper manner down the channel. I don't think a man will be foolish enough—

Q. And while you were coiling this rope, walking around (466) and around like a show horse in a circus, you saw all these things? A. The second whistle was blowing when I stopped; we was past number 9 buoy.

By Mr. HUGHES.

Q. You are positive that you passed close to buoy 9? A. Yes, sir.

Q. And kept down the east side of the channel and were on the east side of the channel at the time of collision, at buoy number 7? A. Yes, sir.

Q. And you are positive you heard the whistles, and they were loud, clear and distinct? A. Yes, sir.

Q. And positive you saw the Victory as you passed buoy 9, and she was a shade on your port bow? A. Yes, sir.

Q. And that she afterwards came into you on your port side, when you were on the eastern edge of the channel as far as you could go? A. Yes, sir.

Q. And you consider your vessel was navigated properly? A. Yes, sir, I do really. I passed that remark at the rail. I said "Look at him; why don't you port yonr helm?"

(467) The further taking of these depositions is here ad-

journed at 5 P. M., until to-morrow (Tuesday), December 29th, at 10:30 A. M.

At 10:30 A. M., Tuesday, December 29th, 1891, reassembled, and JOSEPH WOOD, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. Joseph Wood, 46, Dartmouth, second mate.

Q. How long have you been to see? A. 33 years, now sir.

Q. How long have you been officer on steamers, and how long on the Plymothian? Q. Have been officer on small vessels ever since 18 years of age. In 1876 I passed for master.

Q. You have been sailing in the capacity of officer of vessels since 1876? A. I have been sailing ever since 1856, and have been on the Plymothian since last June, I think, or July.

Q. Where have you been since the middle of November and during the early part of this month? A. Where have I been?

Q. Where were you? A. Been aboard the Plymothian ever since last May or June.

Q. You have not been aboard the Plymothian for the last five or six weeks? A. I have been in the hospital, sir. (468) Q. You have been in the hospital ever since the collision, havn't you? A. Three days after the collision, I think it was.

Q. The hospital in this city? A. Yes, sir; St. Vincent's hospital. A fortnight ago I was struck with this deafness.

Q. Previous to that time had your hearing been all right? A. Oh! yes, sir; nothing the matter with it.

Q. Only the result of your sickness within the last two weeks? A. The deafness struck me all in about two hours. I am just like a dead man on this side now.

Q. What is the matter with you? A. I was smashed all up with a bale of cotton while discharging cargo.

Q. Then, did you have any further trouble after you got to the hospital? A. No further trouble than a fortnight ago I took this trouble in my head, what Dr. Thom said was the "Grippe."

Q. Then, as I understand, three days after the accident you were injured in discharging cotton, went to the hopital and stayed there, and a couple of weeks ago was taken with the grippe in addition to the other trouble, and that has af-

fected your hearing? A. It is a little better now. I couldn't hear anything at all.

Q. And your hearing up to that time had been unim-
(469) paired. Where were you stationed and what duties were you performing when the vessel left Lambert's Point pier on the 12th of November, 1891? A. I was aft on the quarter deck, sir, seeing after my ropes and seeing that everything was clear of the propeller, and that.

Q. You had charge of that watch? A. I had charge of the watch.

Q. State what whistles you heard upon first leaving the pier? A. Three short ones for leaving the pier.

Q. Three short ones were blown just as you were leaving the pier? A. Just close after. I don't know what was the meaning of it.

Q. Did you hear other whistles after that? A. Yes, sir, afterwards.

Q. Was anything the matter with the whistles on that afternoon? How were they in respect to being loud and clear. A. The ones aboard of us were loud and distinct.

Q. The whistles on your own vessel were loud and clear? A. Yes, sir.

Q. Did you notice that black buoy just out of Lambert's Point when you passed it? A. I did, sir.

Q. How close did you come, and on which side did you leave it? A. Starboard side.

(470) Q. How close? A. We were close to it, but how close I could'nt say. We left Lambert's Point on our port helm, full speed ahead, and I looked over the side to see that the ropes were all clear, and noticed this buoy, but the distance—what would be the distance from here to the door?

Q. About 30 feet. You think about 40 or 50 feet? A. I couldn't say over 20 feet.

Q. What course in respect to the channel of the river did the Plymothian take then? A. Took on the starboard hand of the channel; kept on the starboard side.

Q. After passing that buoy did you hear any whistles on the Plymothian? A. Yes, sir.

Q. Just describe what whistles you did hear? A. I heard three, one after the other, plain and distinct.

Q. Little interval of time between? A. Yes, sir; I don't say I counted to see what was the distance, but quite clear and distinct. Of course, it called my attention.

Q. You heard three single blasts given at short intervals of time? A. There was not a great distance between, but it was plain and distinct—as loud as it could be blown.

Q. Did you see the steamer Victory, and where did you

first see her, and when? A. I just catched sight of the steamer just after leaving the black buoy.

(471) Q. How was she then? A. I couldn't give the exact position.

Q. I mean in regard to your boat? A. She was on my port side. I saw her over my port side.

Q. Where were you standing, at the rail on the port side? A. I was on the after deck just by the number 4 hatch when I saw her first.

Q. And she was then on your port bow? A. Oh! yes, sir; a good distance down the river.

Q. Was that when you heard the first whistle? A. No; afterwards. Then I went a little further forward, and I couldn't say the exact time. Our whistle went, and as the whistle went our chain went from the pilot-house on our port side, and I knew the pilot was porting his helm.

Q. The chains on the port side were running from forward backward? A. They were port during that time.

Q. That was when you heard the first whistle? A. They called my attention from the rail to see what was coming.

Q. When did you notice that wheel being put to port, after the first or second whistle? A. When we blew the first whistle the chain began to rattle, and when we blew the second whistle it seemed to me the wheel went hard-a-port, and I looked and could see the vessel slewing like a good

(472) one.

Q. Then I understand you saw the Victory on your port bow, heard one whistle go, and saw the chains on the port side running from forward aft? A. Yes, sir; I knew they were putting the helm to port, and I looked to see if we were getting close to any one or not.

Q. And then heard the second whistle? A. There was a little time elapsed; I couldn't say the exact time.

Q. And you say after an interval you heard the third whistle? A. Yes, sir.

Q. Did you hear any whistle after that? A. Just some little time before the collision there were 3 or 4 little whistles.

Q. Several whistles going in quick succession? A. May be five or three. I was paying more attention to where she was coming.

Q. You saw the Victory coming into you? A. I saw her then and made sure she was coming right into the engine-room.

Q. At the time of collision what was the speed of the Plymothian? Was she going ahead or making sternway? A. She may have had a little sternway, but I saw her way was stopped just before the collision. I noticed just before

the collision, because I was in the bows to see where she was going to strike us.

Q. How about the speed of the Victory? A. I could see (473) better then than any one on the vessel, because I could see the bows and side. I think she was going five knots—had a good way on her. I may be a little out, but not a great deal. I couldn't swear to half a knot or three-quarters of a knot, but I could see by the ripple on her stem what she was doing.

Q. The crew of the Victory and her officers have stated that she was making sternway at the time of collision. Is that so in your judgment? A. I can't see how that could be, sir, because there was no time for the ship to stop before she was in us, and if they made that statement, I couldn't see anyone on the forecastle head until just before they struck us. They may have been there, but I didn't see them; just before they struck I noticed them run up there.

Q. Did you notice any sailing vessels or other vessels in the river near the Victory or ahead of her? A. No, sir.

Q. The channel way seemed to be clear? A. I noticed just before leaving and saw the navigation was nice and clear.

Q. Just before the collision, did you see anything obstructing the channel then? A. No, sir; nothing in the way, and I *good* four good looks at the Victory. If there was any there they was in no way in the way of the Victory.

Q. If she had been near the bows of the Victory you (474) would have seen her? A. I would be bound to.

Q. And you saw no such vessel there; A. I saw no vessel. There may have been vessels astern of her, and there was none there away at the time. The only thing I know was a tugboat or two.

Q. Where did you pass this tugboat; how soon after passing Lambert's Point? A. One close up to Lambert's Point, and the other sung out to the pilot to go full speed on the ground.

Q. She came up to the vicinity of the collision after the collision? A. Yes, sir, she came right up to the bows of the Victory and I heard him ask the pilot if he should take an anchor aground and save the ship. I heard him call the pilot, but don't know what his name was, whether James, John, or what, and I know he took the anchor ahead.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You were stationed aft? A. Yes, sir.

Q. And you were attending to everything that ought to be done in the after part of the ship? A. Yes, sir.

Q. What are those things? A. Seeing that all the ropes are in from the side and that they were all put away in (475) their proper place, and that.

Q. Tell the rest? A. I had nothing but the ropes to put away; everything else was stowed away but them. Of course we saw the wheel chains were clear before we started.

Q. Where was the Plymothian at the time you stopped attending to the ropes? A. Just out to the black buoy, sir. I don't coil the ropes, I tell the man to do it.

Q. Stopped at the black buoy? A. We were just near the black buoy when I came up—

Q. Number 9? A. Lambert's Point black buoy I mean, sir. I couldn't swear to the number of it.

Q. Did you see the red buoy? A. I never noticed any more buoys until after we were on the ground when I put the lead down to see what water we had, and then I saw a red buoy on the opposite side, not right astern; about a point on the starboard quarter. I never noticed any other buoys.

Q. You never noticed the red buoy until after the collision? A. No, sir, we were ashore when I noticed it, sir, and if I hadn't went to heave the lead I don't know if I should take so much notice of it, and I saw a red buoy on the *on the* port hand coming down.

Q. What were you doing after you passed the black buoy number 9, and until the collision occurred? A. I was over (476) on the port side of the deck.

Q. Doing what? A. Between sometimes number 4 hatch and number 3 hatch, telling the men what to do.

Q. Number 4 hatch is aft? A. Is the after hatch of all, sir.

Q. How many men were there? A. Two men there. I had one of my men at the wheel steering the ship.

Q. What were those two men doing? A. They were lashing those ropes fast on the hatch. They have to be secured on the hatch after they are coiled.

Q. And they were engaged in that business from the time the Plymothian passed buoy number 9 until the collision occurred? A. They would barely finish then, sir, securing it.

Q. And you all that time were superintending and directing them? A. Just cast my eye and see if they were doing it right or not.

Q. You didn't do any work; but you attended all that time to what they were doing; you kept your eye on them?

A. I kept my eyes on them. I did move aft once to pick up a piece of rope about that long (about two feet.)

Q. Only moved once? A. Only once, and that didn't take me but about a second, to pick up a piece of rope.

(477) Q. And then to pick up a piece of rope? A. Yes, sir.

Q. And all the time you were diligently attending to and instructing those men in what they had to do? A. Yes, sir.

Q. And kept your eyes upon them and their work? A. Yes, sir.

Q. What time, then, did you have to be looking around for buoys and vessels in the harbor, and steamers and schooners, if you were attending diligently to that work? A. I saw there were not many vessels in the harbor, sir, before we left, because I was looking over the rail just before we left. It was my watch below that afternoon.

Q. That was the time you found that out, that the river was clear? A. I saw it was clear before we left, and we passed nothing any ways close to us.

Q. No steamer passed you? A. I only remember two tugs.

Q. No river steamers? A. I don't remember any.

Q. What two tugs? A. I don't know their names. I forget now.

Q. You are just as positive that no steamers passed down except those two tugs, as you are you didn't see any schooners? A. Not any ways close to us that I remember of.

(478) Q. But you were in as good position to see steamers as schooners? A. I was in a very good position to look down on the side.

Q. You saw no steamers or schooners? A. No, sir. I saw several at anchor before we got any way.

Q. So before the Plymothian left Lambert's Point to go down the river she had a perfectly clear course to go down the western side? A. Clear course down, up and down.

Q. Down the middle of the river? A. We were going down the starboard side.

Q. Was it a clear course down the middle, the east and west side? A. All I could see, sir.

Q. All except this steamer Victory? A. She was a good way down.

Q. Wasn't she the other side of the light-house when you saw her, when you came out of Lambert's point? A. I don't think she was down that far.

Q. When you first saw her was she a mile off? A. I couldn't swear to the distance. I didn't take notice of the distance.

Q. Do you think she was a mile off? A. I don't swear to the distance, because I didn't think of the collision at the time I saw her.

Q. And that is the time you looked over the port side and saw her? A. Yes, sir; when I went after this rope I (479) looked over the side and saw her.

Q. But you have stated you got through with the ropes before you passed buoy number 9? A. I got through all I had to do.

Q. You picked up the rope before you passed the black buoy? A. Just as we were passing the buoy.

Q. Then you hadn't passed the buoy? A. Just turned the black buoy when I saw her.

Q. You were close, then, upon the black buoy? A. We were close upon the black buoy.

Q. And the black buoy is on the eastern side of the river? A. Yes, sir; the one I mean.

Q. And you were close on the eastern line when you saw her first? A. Yes, sir.

Q. And then you saw her over the port bow all the time? A. A great distance off; yes, sir.

Q. And how many points off the bow? A. From the position I was, sir, I should think three points off the bow. I wouldn't be certain of that distance. I didn't think of a collision.

Q. Is Craney Island three points off the bow from buoy 9? A. I couldn't tell. I didn't take that much notice; when I saw the Victory—

Q. When you first saw her you are positive she was three points off the bow, or more? A. I wouldn't swear.

(479½) Q. You think so? A. She looked to be a good bit on the port bow. I didn't take much notice.

Q. Where was the Plymothian the next time you saw the Victory? A. We were further on.

Q. How much further on? A. I couldn't tell.

Q. Had she ported her helm? A. I didn't see the Victory again until I heard our whistle go and the wheel chains go.

Q. That was after the first whistle? A. Yes, sir; and that called my attention there to look, and then I had a fair view of her, and then she appeared to be coming right to our fore rigging; but even if the whistle hadn't have blown I wouldn't have gone over there to look at the Victory.

Q. How far off was she at that time? A. I should think—I didn't look; but she was a good distance off. Any collision could be avoided for certain.

Q. How far do you think? Half a mile? A. Yes, sir;

near that, I think; but I took no notice to say I could swear to the distance. I took a good look at the other steamship to see if she was coming.

Q. You stated that a very short time elapsed between the (480) blowing of the three short whistles? A. No very great time.

Q. Do you think half a minute passed? 30 seconds? A. Yes, sir, from 25 to 30 seconds.

Q. Any more? A. Maybe 5 more. I know the whistles were clear and distinct.

Q. From 25 to 30, then? A. Yes, sir.

Q. No more? A. That I could hardly say.

Q. You have just stated they were very close—a very short time? A. That is a very little time; but as to my swearing to a few seconds, I couldn't do it. I should say 25 seconds.

Q. I want to get your ideas; was it rather less orrat her more? A. If anything it would be about 30 seconds.

Q. That is your fair judgment of it? A. Yes, sir.

Q. You don't know it? Take your time and think about it carefully and see if you want to correct that statement? A. I know the whistles were very clear, and that called my attention to the Victory. If I hadn't heard the whistles I wouldn't have taken so much attention to it.

Q. You paid careful attention to the whistles? A. Yes, sir.

Q. And you say they were as loud as any whistles that (481) could be blown? A. Yes, sir; that is, any way English steamboats. They are not as loud as American steamboats.

Q. What? A. The American whistles. They are the finest in the world. Ours are as good as any English whistles are.

Q. How are they made? A. I couldn't tell you; but there is no steamboat in England, unless they come to America and get them, that can compare with the American whistles.

Q. Then, when you say the whistles of the Plymothian were as loud as could be blown, you mean as loud as the Plymothian could blow? A. No, sir; as any English steamer.

Q. But not as loud as an American steamer? No, sir; the Americans always yell you the English have got no whistles.

Q. Then, there is a great difference? A. Yes, sir.

Q. Is it a very great difference? A. Yes, sir. The American whistles are far superior to any I ever saw on an English steamer.

Q. Do the English whistles have the asthma or bronchitis sometimes? A. I have been asked that sometimes. I was asked it by the captain of the wrecking party why haven't the English steamers louder whistles, as they have so much pressure on the boilers, how is you don't get whistles equal (482) to us? I said I could never find out.

Q. Is it like a man with the asthma? A. That is the difference between them.

Q. Some of them are like the bronchitis or asthma, when they have a cough or cold. Don't these English steamers sometimes emit water and steam from the pipe? A. They will. Before that flies off the whistle wont blow. You have to blow the water and steam off first; that is often done. You find that has got to be done every time before leaving, or else you will have ——

Q. That happens every time? A. No, sir, except when you stop her for any time.

Q. I say when a vessel comes out of dock they generally blow a while first? A. We always like to blow the water off first.

Q. Did you see water blown out that time? A. No water blowing out that time.

Q. I mean before you left the dock that day, did you see that the water was blown out of the whistle of the Plymothian? A. Yes, sir; when you blow the first whistle any time you look to see the water come out.

Q. Where was that? A. Coming out of Lambert's Point.

Q. You did blow at Lambert's Point? A. A little to see she hadn't recovered much water. She had to lay up some days to do that.

(483) Q. Do you think she had the asthma that day? A. No, sir.

Q. She has it some days? A. We always look out about that and blow that off first.

Q. You say there were three short blasts about 30 seconds apart from the Plymothian? A. Yes, sir.

Q. And that the first one was when the helm was ported? A. It was porting then, sir.

Q. And you then went to the rail when you heard the first one? A. I did.

Q. And you got there in time to hear the second one? A. I was there and looked over the side and seen the Victory.

Q. You heard the second one. When you heard the second one—? A. I had turned towards the hatch then.

Q. Just as you started from the rail you heard the second whistle? A. Within a few seconds.

Q. And then within a few seconds after, you heard the third whistle? A. Yes, sir.

Q. How long a time elapsed from hearing the third whistle, when you heard the signal blast of three whistles? A. I couldn't swear to the time; but it was 20 to 30 seconds.

Q 20 to 30 seconds? A. I made a spring for the life (484) buoys in my room, and came back again. I wouldn't say exact to the time.

Q. You think it was 20 to 30 seconds? A. I didn't notice. Say 20 seconds.

Q. From the time the third single blast was blown until the signal blast of three whistles was 20 seconds? A. Yes, sir.

Q. And you sprang for the life buoys? A. Yes, sir, and came back again.

Q. And did you get the life buoys? A. When she struck us I went down after them. I knew she couldn't shove us any further. I saw her shove us down three plates, and then I went for the life buoys.

Q. When the signal blast of three whistles, the danger signal, was blown, were you one of the men that jumped off the bridge? A. Off the bridge?

Q. Yes, sir? A. No.

Q. Who were the men that jumped off the bridge? A. When the Victory was, I should say, about the length of this table from coming right into the bridge the captain and pilot ran off the bridge and ran away aft and sang out to look out, but the two men at the wheel didn't hear it. As the captain and pilot passed me I went to the engine-room skylight. I heard the captain say, "Everybody look out for himself," but I knew she couldn't go any further than the bottom.

(485) Q. Was it over a minute from the time the three whistles were blown until the collision occurred? A. I haven't any means to count.

Q. Was it any longer than the distance between the other whistles? A. Not very much longer. I wouldn't tell you wrong. The Victory and the people aboard her deserve the truth told about them, as well as we want the truth told about us.

Q. You only desire to tell the truth. You say it was about the same time from the danger signal to the collision as from the third whistle to the danger signal? A. I should say there was no great difference between any of the signals.

Q. I am speaking of the time that elapsed between the danger signal and the collision. Was it a longer or shorter time than the time between the third signal and the danger

signal? A. There may be a little, sir, but I don't think there was much difference.

Q. According to your judgment, as you have stated, you say the collision was certain to happen at the time of the danger signal? A. At the second whistle I said to the watch—there were two men—I said, "there is bound to be a collision." I will tell you the reason I didn't see any hope for it. I saw an anchor at the bows and I said he will come up and rip her right in.

(486) Q. When the second of the three whistles was blown, you saw a collision was imminent? A. I saw she was apt to strike us.

Q. And when the danger signal was blown she was right upon you? A. Not exactly, but right close up to us.

Q. How close up to you? A. Not exactly—right close on top of us.

Q. Was she 100 feet off? A. I should say she was.

Q. Was she 150 feet off? A. She may have been 150 feet.

Q. Any more? A. I didn't think of anything like that; if I had I could tell you exactly.

Q. I am speaking of your judgment. Was it 100 or 150 feet? A. Pretty near on to 100 feet.

Q. And at that time there was no power to prevent a collision? A. I don't see how they could help it.

Q. Now, you have spoken of coming out of Lambert's Point and before passing the black buoy. Why did the Plymothian stop off Lambert's Point? A. Why did she stop?

Q. Yes, sir. A. I never knew her to stop.

Q. She didn't stop then? A. No, sir; not off Lambert's

(487) Point.

Q. Where did she stop? A. A good ways down; nearly where the collision occurred. Not off Lambert's Point.

Q. You did't stop off Lambert's Point? A. No, sir. We came off on port helm.

Q. Did you say the helm was hard-a-port? A. I did, when she was leaving there, and it looked to me, from the rattling of the propeller she was coming full speed.

Q. You were looking out at that time? A. Of course I had to look all around.

Q. You were looking over the side at that time? A. Yes, sir.

Q. And looking over the side at that time, and according to your recollection she shot from that wharf under port helm and at full speed? A. I should say so from the rattling of the propeller with the shake she was giving. You can generally tell whether she is going full speed or

half speed. You can always tell when she is going astern, because she always shakes more going astern than going forward. That is the way I tell.

Q. How long did she keep up before she checked her speed? How many minutes? A. After we passed the black buoy. I should think we had nearly come to full speed before we checked her; I should say she had just (488) gathered way, because she came out, and answers her helm very lively. I should just say that when the pilot first blew his first whistle we had just got on her fair way. She hadn't overcome her way, because she has got to go some distance.

Q. If she was going at full speed, she kept on increasing her speed from Lambert's Point until after passing the black buoy. You say she didn't check her full speed ahead until— A. Not before the pilot blew his first whistle, I should think. I heard the telegraph go three different times; but really I didn't pay any attention to them, what it was.

Q. Of course you don't know what was done in the engine-room, and don't know what orders were given? A. Of course I heard the bells ringing. Of course I looked around, and that is the way I could tell whether she was eased or going astern or what.

Q. She was going ahead from Lambert's Point to the black buoy and passed the black buoy? A. Of course. Going ahead all the time.

Q. And at full speed? A. Yes, sir. I should say going at full speed.

Q. And never checked her speed until the first whistle blew? A. That is the first time I heard the telegraph ring. They might have done it, but whether it was "stand by" or "ease" or half speed, or what, I couldn't say.

(489) Q. How many times do you suppose he rang that you heard? A. I heard him ring three times, from the time the first whistle blew until the collision; but what the telegraphs were I don't know.

Q. How many times did you hear him ring from Lambert's Point until the first whistle was blown? A. I don't know that I heard him ring any time. He might have, but I didn't notice it.

Q. You heard three times after; but none before? A. No, sir. If he did, I didn't notice them.

Q. If anybody was to tell you she stopped off Lambert's Point would you believe it? A. I believe it would be a lie, because I know she didn't.

Q. If anybody was to tell you she stopped her engines off Lambert's Point, would you believe that? A. If she stopped the engines I don't know it.

Q. Would you believe it? A. No, I would not.

Q. What would you believe it to be? A. Believe it to be wrong.

Q. Suppose anyone was to tell you that between Lambert's Point and the blowing of the first whistle that the Plymothian checked her speed and went half speed instead of full speed, what would you believe that to be? A. I don't believe the speed was checked before the first whistle.

Q. You wouldn't believe it if they told you so? A. I (490) wouldn't believe it. Of course, she couldn't have got more than her full speed

Q. I am not referring at all to your infirmity of being hard of hearing, because you were not hard of hearing that day; and I hope and believe it will come back to you soon. But now, referring to what St. Paul said, that our brother Peter has said some things that are hard to believe, you think those things are hard to believe? A. Yes, sir.

Q. Even if our brother Peter said so? A. You know Peter remembered his words; but some people don't.

Q. If St. Peter said it, it would be hard to believe? A. It would, because Peter didn't tell the truth.

Q. When the steamer Plymothian is on the eastern side of the channel, and ports her helm, does she move towards the bank or away from the bank? A. Towards the bank, sir.

Q. Suppose she is close in to the shore? A. She was no ways of the side of the channel when she struck us.

Q. But the steamer Plymothian is like other steamers in that regard, that when she is close to the eastern side and ports, she is apt to run ashore? A. Certainly. We would have run ashore if we had gone a little distance further.

Q. What is the distance from buoy 7 to buoy 9? A. I (491) don't know that I took that much notice to judge.

Q. Is it not nearly half a mile? A. I should think the channel was 5 or 600 yards, or approaching it.

Q. You were there three days; you could see Lambert's Point from where you were. Now, want it about half a mile between those buoys? Supposing it was half a mile or rather less between buoy 9 and buoy 7— A. I hardly know the buoys 5, 6, or 7.

Q. The black buoy, 9, is Lambert's Point; the collision buoy is 7. Supposing it was half a mile or less between those buoys, and that the Plymothian was 40 to 50 feet from buoy 9—and you say she trips it well on the light fantastic toe—turns rapidly, and she kept on porting her helm and putting it hard-a-port from buoy 9 to buoy 7, would you believe anybody that told you she wouldn't go ashore? A. When she came around the black buoy under

hard-a-port helm she stops again. If she didn't she would have turned right around into Lambert's Point. If she had kept on hard-a-port she would have come around in a circle.

Q. She would have turned right around? A. Yes, sir.

Q. Where did she steady her helm? A. Just after she passed the buoy, like, to me.

Q. Could she pass the buoy and go north by steadying (492) her helm? Would that carry her around the buoy? A. You see she was around the buoy when they steadied her helm.

Q. And could she get around the buoy without porting her helm? A. She had her helm hard-a-port until she got around the buoy.

Q. And she was coming out of Lambert's Point under hard-a-port helm? A. Yes, sir.

Q. before passing the buoy, and at passing the buoy was the helm-port or hard-a-port? A. I should say hard-a-port.

Q. Do you know how it was? A Yes, sir; I looked at the helm.

Q. It was hard-a-port passing the buoy? A. Yes, sir.

Q. And after passing the buoy she steadied her helm. A. Yes, sir.

Q. And you say, then, that the steamer Plymothian could pass within 40 or 50 feet of buoy 9 and keep her helm hard-a-port without running into the bank? Do you know the fact that the bank at that point protudes to the west instead of east—to the north of that buoy? A. We went out this way with the helm hard-a-port and full speed and passed that buoy—

(493) Q. Went on a circle with helm hard-a-port? A. Yes, sir.

Q. And went close to the buoy? A. Yes, sir; not a great distance.

Q. And rounding the buoy with helm hard-a-port? A. I know they steadied soon after.

Q. Rounded the buoy with helm hard-a-port? A. Yes, sir.

Q. And after they rounded the buoy she steadied her helm? A. Steadied the helm, or else she would have gone right on the mud.

Q. But she had ported her helm coming out of Lambert's Point? A. Of course, sir.

Q. And put it hard-a-port rounding the buoy? A. All the way it had looked to me hard-a-port.

Q. You think the helm was hard-a-port from the time you left Lambert's Point until you passed the buoy? A. I should swear she did, sir.

Q. And didn't run into the bank? A. We never went into any bank

Q. And you say at full speed all the time? A. They started ahead full speed.

Q. And didn't stop her? A. Of course, when we were some distance past she started to slow.

Q. Would you believe it possible that a vessel so close upon the bank as to be within 40 or 50 feet of the buoy and (494) *and* that bank extending southeast towards Lambert's Point, that she could go out of Lambert's Point with helm hard-a-port and rapidly, and without checking her speed could turn that buoy? A. If they steadied the helm again out there I never saw them do it.

Q. And they went ahead without stopping? A. I didn't see it.

Q. She didn't stop out there to turn around? A. No, sir; I never saw it. I never seen anybody stop and turn around there.

Q. Have you ever navigated a vessel? You say you have been captain in former years—how do you account for that rapid promotion downwards from captain to second mate? A. On account of trade, sir. I could show you—

Q. Did you, when you were master, ever run a vessel that was close to the starboard side, near a bank on the starboard side—did you ever put her helm hard-a-port and run her full speed without striking the bank? A. Not if I ran towards the bank.

Q. Is it not running towards a bank from Lambert's Point to buoy 9? A. They might have done it.

Q. You say they might have? A. If they did I didn't notice it.

Q. Do you believe you could take the Plymothian from (495) Lambert's Point and pass that bank, which extends from Lambert's Point to buoy 9, and that you could ring that boat up and put her helm hard-a-port without striking that bank? A. Yes, sir; I think from the times I have come out there— I don't mean to say I could really do it.

Q. Who could do it? A. Because I don't know exactly how that bank goes.

Q. Did you ever see that pilot before? A. Never in my life to my knowledge. The pilots I have been coming here—

Q. You have seen the master of this ship before? A. Never saw him before I shipped in Cardiff, sir.

Q. Did you ever see this master, when in charge of a ship and navigating, put his helm hard-a-port close to a bank and ring up without running ashore? A. I never seen him put one on a bank, not if he knew there was a bank.

If he puts her head towards the bank and goes full speed she must go on it.

Q. You wouldn't believe anybody who told you he did it and didn't run in? A. He must do it.

Q. Who was navigating that day, the master or the pilot? A. The pilot.

Q. You say somebody did it that day? A. I said if her helm was steadied after I saw him port I never noticed it; if he did, I didn't notice it. I said they came out on port (496) helm.

Q. A man can come out of Lambert's Point under port helm and at full speed without checking his speed and without running into the bank? A. He went out on his port helm I know. If he did steady I never noticed it. If anyone else asked me how she went out I would have told them that.

Q. You then finish your testimony by saying you do believe that a steamer can come out of Lambert's Point and round that buoy under port helm and keep under port helm, without running into the eastern shore? A. We didn't keep all the time under port helm, If we did we would have run right back into the shore, on the mud.

Q. You say you believe you would have run on the mud? A. Yes, sir, I know we would.

Q. You believe the Plymothian could have come out of Lambert's Point at full speed under port helm, and without changing her helm, without running on the mud? A. If she did steady her helm I didn't notice it.

Q. Do you believe she could do it without steadying her helm? A. I wouldn't be certain of that because we had a flood tide to catch us on the bow; but if anybody had asked me—

Q. The flood tide makes a big difference then? A. It has caught the weight of the ship's bows at that time.

Examined by Mr. MYNDERSE:

Q. Do I understand you to say there were some whistles blown by the Plymothian just as she was leaving the pier? (497) A. Yes, sir, there was, just at the time.

Q. Then after she got out and rounded the buoy she blew three times, you say, about half a minute between them? A. Yes, sir, about that.

Q. Were those single blasts? A. Yes, sir.

Q. What did they mean, porting or starboarding? A. I should say they meant porting. I saw the helm put a-port.

Q. They meant porting? A. I suppose so, sir. You know I have never been brought up to blowing whistles. I considered it must be to port.

Q. You took them to be three separate whistles of one blast each? A. Yes, sir.

Q. You have stated that at the time of collision the Victory shoved the Plymothian over three plates? A. She did, sir.

Q. You mean by that rolled her over until she raised her three plates? A. Yes, sir.

RE-EXAMINATION.

By Mr. HUGHES:

Q. How was the tide when you left the pier? A. I should think about an hour and a half before high water.

Q. A steamer leaving the pier on the north side, would (498) she not be affected by that flood tide? Would not her stern be thrown against the pier? A. Certainly; they must give her more port helm for that—how much I couldn't tell.

Q. If she was approaching the wharf so as to injure the stern by hitting the wharf going out of the pier, what order would be given to the engineers? Wouldn't they stop the engines to ease her off? A. Stop the engines and let her fall alongside the wharf to save the propeller.

Q. Coming out of the pier that day, was not that done? A. If it was I didn't notice it.

Q. She didn't stop after she left the pier? A. Our way didn't stop.

Q. That is what you mean by not stop, that the way did not stop? A. Yes, sir

Q. But you don't pretend to mean the engines did not stop as she came out of the pier? A. No, sir, I couldn't tell that.

Q. She came out of the pier slowly? A. About eight feet off when we started, but how far off when we came to the light-house I couldn't say. I was not on that side then.

Q. You were on the starboard side then, and really don't know what the engines were doing as they left the pier itself? A. No, sir, I do not.

(499) Q. After you got clear of the pier you know the way of the vessel did not stop at all? A. No, sir.

Q. And she seemed to be going under port helm? A. Yes, sir.

Q. And the helm at one time seemed to be hard-a-port? A. Yes, sir, I am sure of that, sir. I could hear the grinding of the chain.

Q. As you rounded the buoy you saw that buoy? A. Yes, sir.

Q. After passing the buoy she steadied her helm? A. I wouldn't say whether we were past the buoy or whether it was abreast of number 4 hatch when it was steadied.

Q. And she contined down the east side of the channel? A. Well down on the east side of the channel—the starboard side of the channel. The only thing I know about the channel is I looked at those schooners.

Q. You observed this black buoy also? A. Yes, sir.

Q. And that is what you mean in what you have stated heretofore in respect to the movement of your vessel? A. Yes, sir.

Q. How does the whistle of the Plymothian compare with the whistle of the Victory? Is it as loud and clear as the whistle aboard the Victory? A. I never heard the whistle from the Victory.

Q. Is the whistle of the Plymothian as clear as the whis-
(500) tle of any other English steamer? A. As these tramps are.

Q. It is a good whistle for a tramp? A. Yes, sir.

Q. Her whistle is good? A. Yes, sir; of course all the crack vessels have these American whistles.

Q. In superintending the men who were coiling the rope, your attention was not drawn to them all the time? A. I was looking at the shore and all around.

Q. And occasionally glance over to the men and see that they were attending to their duties? A. Yes, sir; and I was not standing in one place, I was moving from one place to another; but I have no knowledge of going over to the starboard side of the deck more than once after passing the black buoy.

Q. You have stated that when the Victory struck the Plymothian she listed her three plates? A. Yes, sir; she did, sir.

Q. Did she strike her on a strong part of the vessel? A. She couldn't have hit her at a better place, the strongest part—right in the iron bulwark and cotton and coals. She couldn't have done it better wherever she was.

Q. She struck her in the very strongest part of the vessel, opposite the iron bulwark and the coal and cotton? A. She had a shove at the three of them, sir.

Q. You have already stated that the whistles of the Plymothian on this afternoon were clear; there was no water
(501) in them? A. No water at all; they sounded as well as I ever heard them.

Q. And all this talk about asthma had no bearing on this particular evening? A. No, sir.

Q. This estimate of yours as to the distance the Victory was at when the danger signals were sounded by the Ply-

mothian, and the time between the danger signal and the collision, is a mere estimate of time? You don't mean to say that is correct, do you? A. No, sir; as I said before, I couldn't be certain of the time.

Q. At that time you were thinking of the life buoys, too, were you not? A. Yes, sir; you see I was 15 feet out of my reckoning; I thought she was going to run through the engine-room and kill all the engineers, and as soon as she struck us I shoved the life-buoys up.

Q. You didn't take much time to calculate the distance or time? A. I made a little run to sing out to the engineers in the engine-room, because it looks a comical thing to see men killed and not sing out.

Q. You stated you saw the captain leave the bridge. When was that? A. That was as they were coming together.

Q. The vessel was struck near the bridge? A. Right fair in the upper bridge.

(502) Q. And they left the bridge only as the vessels were coming together, as the bridge was being actually struck? A. By the time they got to the engine-room sky-light, sir, they was right into us, and the men at the wheel never left their position; they never heard, because I asked them that, why they didn't run out and run forward. They couldn't see out of the pilot house door. One of them would have stayed there, too—that Dutchman; I don't know but what he would hold on until he died.

Q. (By Mr. SHARP): He has good grit? A. Yes, sir; I say he will stop there until he died.

GUSTAV ECRATH, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. Gustav Ecrath, 26, Finland, carpenter of the Plymothian.

Q. How long have you been at sea? A. Twelve years, sir.

Q. As marine carpenter? A. No, sir, four years as able seaman.

Q. How long have you been on the Plymothian? A. I have been in her one year and one month.

Q. Were you on board on the 12th of November when she had an accident? A. Yes, sir.

(503) Q. Where were you stationed? A. I was first up on the forecastle head.

Q. Then where did you go? A. I went down to my shop, sir.

Q. Did you hear the whistles of the Plymothian at any time that evening? A. I heard one set just as I went down from the forecastle head.

Q. Did you hear it blowing before that time as you were passing any tugs? A. Yes, sir; I heard three as we passed—I don't remember the name of the boat—the water boat.

Q. And when you went down from the forecastle head you heard another? A. Yes, sir.

Q. Where did you go when you went down? A. In my shop.

Q. Did you hear any whistles in your shop? A. Yes, sir, but I didn't notice what they were.

Q. These whistles you heard, how where they in respect to being loud and clear? A. The first one I heard when I went down from the forecastle head; they were clear.

Q. How about the ones to the water boat? A. Yes, sir, they were clear.

Q. Then you went below and didn't know what was happening on deck? A. No, sir; I was in the shop working, (504) and then a man gave a shout to me afterwards, and I went out and came from forward to the bridge when she struck.

Q. You just got to the bridge when the vessels came together? A. Yes, sir.

Q. Did you notice the black buoy just after leaving Lambert's Point? A. No, sir.

Q. The only thing you know, was that you heard those whistles, and they were loud and clear? A. Yes, sir

Q. You were down below and didn't see anything else? A. No, sir.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. Where was the water-boat? A. She was just when we came from the coal pier; just as we came out from the wharf.

Q. Before you passed the buoy? A. I didn't take any notice of the buoy; it was just as we came out of the coal pier on the starboard side lying at anchor.

Q. Just as the Plymothian came out of the Lambert's Point coal wharf you passed this water-boat? A. Yes, sir.

Q. That was lying at that wharf? A. Yes, sir, he was lying there. I couldn't say whether he was lying at anchor (505) or not; he was stopped.

Q. He was anchored? A. I think he was anchored; he was stopped.

Q. He was still in the water? A. Yes, sir.

Q. Did you see the boat after that time? A. Yes, sir—

Q. That day? A. I can't say. I think he came alongside of us after we were on the ground.

Q. But you didn't see her again until you were on the beach? A. No, sir.

Q. And three whistles were given to her? A. Yes, sir, gave three whistles to her.

Q. Were they loud—were they good whistles? A. Yes, sir, good whistles.

Q. Those three whistles, then, were good? A. Yes, sir, those three were good.

Q. You are positive those three whistles were good? A. Yes, sir.

Q. You are carpenter of the ship? A. Yes, sir.

Q. How did the water happen to get into the cotton in more than one compartment of a compartment steamer? A. That is more than I can say; but I think the door between the stoke hole and the bunker was not tight enough. I have never been to see it; but I think it is not proper tight.

(506) Q. Have you never examined it? A. No, sir.

Q. You are carpenter of that ship? A. The only thing I examined was the tanks; they was tight.

Q. Has the master ever asked you to examine it? A. No, sir; not the bulkheads between the holds.

Q. You never gave any attention to the matter? A. No, sir.

Q. Your belief is that the bulkhead is not tight? A. Yes, sir.

Q. Why do you believe it? A. Because if it was tight the water couldn't come from one hold to the other.

Q. The bulkhead doors were closed? A. Yes, sir; the bulkhead doors were closed between the bunker and the stoke hole.

Q. Were all closed? A. Yes sir.

Q. Every one? A. Yes, sir.

Q. How do you know that? A. Because I closed them myself.

Q. When did you close them? A. Down in Galveston before we put the cotton in.

Q. Every one? A. Yes, sir.

Q. And you had no occasion to open them any more? (507) A. No, sir; no use to open them. I had the keys to those doors, and nobody opened them but myself.

Q. Did you have the key that day? A. Yes, sir.

Q. To every one? A. Yes, sir.

Q. Did you have the key to the one between the bunker and the stoke hole? A. Yes, sir.

Q. Did you have the one between the bunker and No. 2 hold? A. That one is wood, and is not proper tight—not an iron bulkhead.

Q. You didn't have the key to that? A. No, sir.

Q. That was left open? A. Yes, sir.

Q. Why? A. That must be left open. That one is wood, you can't shut it.

Q. You can't open or shut it? A. No, sir.

Q. It can't be opened? A. No, sir.

Q. Did you have to leave it open for the engineers to pass through? A. No, sir; no engineers can pass through there; the ship was full of cotton.

Q Wouldn't it have been better to close it? A. It would (508) have been better to close it, but the hold was full of cargo.

Q. But water can pass through there? A. Yes, sir, water can pass through.

Q. You think water got through that bunker? A. Yes, sir, the cargo—

Q. It went into other compartments besides the one damaged by the collision? A. Yes, sir.

Q. Do you know any good reason why a compartment ship damaged in one compartment should have the cargo damaged in other compartments? A. No.

Q. There is no good reason? A. No, sir.

Q. She ought to be tight? A. Yes, sir.

Q. And if she is tight, and one compartment is injured, the injury is confined to that one department? A. Yes, sir. A. If it isn't tight between it will get through.

Q. But when the compartments are not tight the water passes through from the injured compartment to the ones that are not injured? A. Yes, sir

Q. And injures the cargo in all? A. Yes, sir.

RE-EXAMINATION.

(509 By Mr. HUGHES.

Q. Suppose the shaft had gotten out of order on the voyage, how could it have been fixed by the engineer's department? How would they have reached the shaft? A. That is a thing I don't know anything about, the engineer's part.

Q. You know where the shaft of the engine runs? A. Yes, sir.

Q. How does the engineer or any one who has to fix anything wrong with that shaft, go down to that part of the vessel? A. There is a place what we used to call the tunnel in the ship, and he goes there.

Q. How does he get into the tunnel? A. He has some doors there.

Q. Where is that door in your ship? A. It must be in the engine-room.

Q. Do you know whether that door was shut or open? A. It must be open that time I think; I can't say that exactly.

Q. Did he have charge of that, or you? A. He has charge of that.

Q. So you don't know whether that door was shut or open? A. No, sir, I don't know anything about that part of it.

Q. And in what you have stated just now, you had no reference to that door? All the others were closed? A. The doors between the bunker and stoke-hole were shut.

(510) Q. They were shut? A. Yes, sir.

Q. How about the other compartments? A. The other compartment in the engine-room I don't know anything about; that there I have nothing to do with.

Q. The engineers have charge of that? A. Yes, sir.

Q. So they can go down into the tunnel? A. Yes, sir.

Q. How much experience have you had in building vessels with water tight compartments? A. It is a thing I don't know anything about.

Q. You don't know, then, whether it is practicable to make those compartments absolutely water tight or not. A. No, sir.

Q. You do know that water got in some of these compartments after the vessel had been in serious collision and was lying at the bottom of the river? A. Yes, sir.

Q. You don't know whether those compartments were tight before the accident or not? A. No, sir.

Q. You don't know that they were not tight? A. No, sir; there has never been any water in there before except in the tanks.

Q. Never had any trouble with her before? A. No, sir.

Q. That is the first time you knew the leak, and don't (511) know that was caused by the accident or lying at the bottom of the river or what? A. No, sir.

By Mr. SHARP:

Q. All you know is that when you got water in one compartment it spread into the other compartments? A. Yes, sir.

Q. And you infer from that that the partitions were not water tight? A. That is a thing I can't say.

Q. You judge that? A. Yes, sir.

Q. You have spoken of a tunnel doer, and that that tunnel door is kept open for the use of the engineers in case

the shaft should be broken. Can that door be closed? A. Don't believe I can say I have ever been down there to see.

Q. If it is a door it can be shut? A. I can't say. I have never been there to see. I never noticed it.

Q. You don't know, then, whether in this compartment of the ship the engineers kept this door open all the time in case there should be an accident to the shaft? A. I can't say anything about it, sir.

(512) Counsel for the Plymothian here offer the following being the remainder of the crew on board at the time of the collision, for the purpose of cross-examination, if desired, by opposing counsel.

H. Cook, R. Normanson, A. B's.; J. Adamson, A. B. (sick at the time); J. Neilson, fireman on duty; J. Crogan, fireman on duty; H. Quanstrom, in forecastle; Saunders, assistant steward; the only remaining member of the crew on that day being one A Williams, fireman, who has since left the ship, his whereabouts being unknown to counsel.

The counsel for the Victory here request the master of the Plymothian to specify which of these men saw the occurrence and are able to testify of their own knowledge as to what occurred.

Counsel for the Plymothian replied, the cook did not see it, being in the cook-room; J. Adamson was sick; J. Neilson was fireman on duty; J. Crogan was fireman on duty; Quanstrom was in the forecastle, and Saunders in the mess-room, and the only remaining one who saw it was Williamson.

Counsel for the Victory has no desire to examine witnesses who are said to know nothing of the matter.

ALLEN MARDON, master of the steamship Plymothian, the next witness, being duly sworn, deposed as follows:

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation? A. Allen Mardon; 39; master mariner; master of the Ply-
(513) mothian.

Q. How long have you been at sea; how long as officer of a vessel, and how long master of the Plymothian? A. Twenty-four years at sea; officer since 1872; master since 1888.

Q. How long have you been in command of the Plymothian? A. Since the 5th of June.

Q. Where does your vessel hail from, what flag does she carry, and by whom owned? A. Hails from Plymouth, England; owned by Bellamy & Co., of Plymouth, England.

Q. Are they the managing owners? A. Limited liability company, Bellamy & Company managing owners.

Q. Under what flag does your vessel sail? A. British flag.

Q. Describe her tonnage, gross and net, and how long she is? A. 260 feet long; 1016 net register; 1578 I think is the gross, I am not certain.

Q. What is the usual complement of officers and men, and did she have them on the day of the collision? A. Twenty-one hands all told; master, first and second officers, three engineers, two stewards, cook, five firemen, six sailors and the carpenter.

Q. How many did you have upon leaving Lambert's Point pier on that afternoon? A. Full complement.

(514) Q. Just state who was on the bridge navigating the vessel and who was—? A. Myself and the pilot on the pilot on the bridge; the others variously employed at their duties.

Q. What duty were you performing? A. I was the commander of the ship.

Q. Who was actually navigating the vessel? A. The pilot.

Q. What duty were you performing? A. Keeping lookout, seeing what was going on as regards navigating her.

Q. Who was at the wheel? A. William Lyons and John Hendema.

Q. Who was the regular wheelman, and who was assisting him? A. William Lyons, regular wheelman.

Q. Where was the first officer, and what was he doing? A. He was on the forecastle head and the forward part of the deck, getting the ship ready for sea.

Q. And the second officer? A. On the after part of the deck doing the same duty.

Q. What cargo did you have aboard and where had it been shipped? A. Cotton, Galveston bound to Liverpool.

Q. How many bales? A. 3,682.

Q. You signed the regular bills of lading for those bales? A. Yes, sir.

(515) Q. In the libel of the owners and insurers of the cotton, in the 15th article of their libel, they charge that a shipment of 85 bales was delivered on board your vessel. Please state in what manner the bills of lading for that particular shipment were signed, and whether in discharging the caigo of cotton after the collision, those bales were found to be on board or not? A. The bills of lading were signed in dispute, because the cargo was not supposed to be on board. I don't think they have been found since; therefore they were never shipped.

Q. The other shipments as stated in the libel of the owners and insurers you have found to be correct, have you? A. Yes, sir.

Q. The bills of lading for that particular shipment were signed, if on board to be delivered? A. Yes, sir.

Q. And in discharging the cotton were found not to be on board? A. Yes, sir.

Q. Your vessel left Galveston in due course after taking this cargo on board, and proceeded to Norfolk for coal, did she? A. Yes, sir.

Q. When did she arrive here? A. November 12th. Arrived at Hampton Roads at 4 A. M., anchored there until daylight, and proceeded to Lambert's Point to take on (516) coals; arrived at Lambert's Point at 7 A. M.; at 7:30 or 8 A. M., commencad coaling; finished at 1 P. M.; 4 P. M., proceeded on the voyage.

Q. Where did you first take on the pilot? A. Coming in or going out?

Q. Coming in? A. Cape Henry.

Q. And you proceeded with the pilot on board, as you have stated, arriving at Lambert's Point on the morning of the 12th? A. About 2 A. M. we took the pilot on board.

Q. At Cape Henry? A. Yes, sir.

Q. Regular Virginia pilot? A. Licensed Virginia pilot.

Q. When you finished coaling and proceeded to sea, did you have the pilot on board? A. The same pilot.

Q. Give his name? A. Robert Henley.

Q. He was a licensed Virginia pilot, was he? A. Yes, sir.

Q. State what occurred upon your leaving the pier? A. After we coaled, about 4 o'clock, I went on the bridge, and while the men were getting the ship ready for sea, while standing on the bridge I saw three river steamers pass down.

(517) Q. Was the pilot on the bridge at that time? A. Yes, sir, both on the bridge together.

Q. You saw three river steamers pass down? A. Yes, sir; which I believe were the Louise, Luray and Virginia Dare, and at 4 o'clock, everything being ready, the engines were rung "stand by," and we immediately let go the ropes and proceeded slow ahead.

Q. Who gave the order to slow ahead? A. I rang the telegraph slow ahead. The pilot gave the order slow ahead and I rang the telegraph; immediately that was done the whistle was blown.

Q. Who blew that whistle? A. The pilot blew the whistle. I rang the telegraph and the pilot blew the whistle; the helm was put a-port—not hard-a-port, but a-port.

Q. Under whose orders? A. Under the order of the pilot.

Q. The pilot gave the order to the helmsman? A. To port the helm.

Q. Then what was done? A. The engines were stopped.

Q. For what reason? A. Because the ship was coming around so quick. We would have hit the propeller on the end of the wharf and broken it if we had not stopped her.

Q. How was the tide? A. Flood; but there is a break-
(518) water there and you don't feel the effect of the tide until you get away clear of the wharf.

Q. The steamer was coming around so quickly under port helm the engines were stopped to prevent breaking the propeller on the wharf? A. Yes, sir.

Q. How long were the engines stopped? A. Half a minute.

Q. Until the pier was cleared? A. Yes, sir.

Q. Then what order was given? A. Half speed ahead.

Q. How long did she proceed under that order? A. Until we got over near number 9 buoy.

Q. Under what helm? A. Port all the time. Not hard-a-port, slightly aport.

Q. When was it put hard-a-port? A. When we got out close to number 9 buoy.

Q. How were the engines then? A. The engines were going full speed at that time. They were first rung half speed and then full speed.

Q. About the time the engines were put full speed her helm was thrown hard-a-port? A. Yes, sir.

Q. How close did you pass that buoy, and which side did you leave it? A. From 20 to 30 feet on the starboard side.

(519) Q. Then what was done? A. As soon as we rounded the buoy and straightened down the river the helm was steadied.

Q. Who gave the orders to the engineer and the helmsman that you have described? A. The pilot was navigating the ship.

Q. And he gave the orders? A. Yes, sir.

Q. Where were you stationed? A. Nowhere particular. I was walking from one side of the bridge to the other, as required.

Q. And where was the pilot in respect to the speaking-tube to the helmsman and the telegraph? A. Standing with the speaking-tube on one side and the telegraph close alongside.

Q. Passing buoy 9 with the helm hard-a-port and steadying her when you straightened down the river, what did you

observe? A. As we came close to the buoy 9 the water-boat Pioneer was lying close to the east of the buoy and the Commodore was lying to the west—

A. Out in mid-channel? A. Yes, sir, and my being acquainted with both of them I gave a salute in passing. The water-boat was lying east of the black buoy, and as we passed by he wished me a pleasant passage.

Q. You heard those whistles? A. Certainly.

(520) Q. How were they in respect to being clear and distinct? A. Clear and distinct.

Q. How about being loud? A. Loud, clear and distinct, no water or steam. Previous to leaving the dock the first thing I did was to blow the whistle to blow the water out.

Q. That was some minutes before leaving the dock? A. Yes, sir.

Q. And upon leaving the dock you blew the signal whistle that you were leaving? A. Yes, sir.

Q. And afterwards blew the whistles to the Commodore and Pioneer? A. Yes, sir.

Q. Upon passing buoy 9 and steadying her helm upon straightening down the river, what did you observe? A. I observed this steamer coming up.

Q. What steamer? A. The Victory.

Q. How was she then? A. Somewhere about Craney Island.

Q. How in respect to your vessel—starboard, port, or ahead? A. On the port bow after rounding the buoy; before rounding the buoy she was on the starboard bow, just below Craney Island

Q. Upon rounding the buoy and steadying the helm you (521) brought her on the port bow? A. Yes, sir.

Q. And what position in respect to the channel was she occupying? A. Somewhere near about mid-channel, as near as I could judge.

Q. She was on your port bow; how were you with respect to her? A. If she was on our port bow we were on her port bow.

Q. Such being the situation of the vessels, what signal was given, if any? A. One whistle, given by us.

Q. Who sounded that whistle? A. The pilot.

Q. And how far from buoy 9 were you then? A. We would be about 100 yards below buoy 9.

Q. And under helm amidships? A. The helm was working as required.

Q. What was done upon sounding this whistle? A. Still went on.

Q. Did you hear any reply from the Victory? A. No reply from the Victory.

Q. What was done then? A. Still went on, keeping on the east side, and gave the second blast.

Q. Did you hear any reply to that? A. No, sir.

Q. How long was that after the first whistle? A. From
(522) a minute to a minute and a half.

Q. Did you receive any reply to that? A. No reply to that.

Q. You still proceeding down on his port bow and he up the river on your port bow. A. Yes, sir.

Q. You proceeding down on the east side? A. Yes, sir.

Q. And hearing no answer to the second whistle, what did you do? A. Gave the third whistle.

Q. How long after the second? A. About a minute to a minute and a half.

Q. Did you hear anything then? A. Heard two whistles.

Q. What movement did you observe then? A. Saw him starboard the helm.

Q. What did you do then? A. On hearing these cross-whistles we blew three times and put the ship full speed astern.

A. And mean time how had your helm been put? A. The helm had been put hard-a-port.

Q. Had it been changed from steady before that? A. We had been steering down the east side of the channel until we saw a collision was likely, and then we put the helm hard-a-port when we saw him come up on his starboard helm.

(523) Q. How near was the Victory to you at that time? A. It's a little bit hard to judge of distance; but I should say from 200 to 300 yards.

Q. Just continue to describe what occurred after that? A. We blew the whistles and put the engines full speed astern, and after the engines had been going astern a short time, we heard him blow his signal and put his engines astern, and he was coming up full speed and had not time to stop his way before he was into us.

Q. What effect did your engines being reversed have on your ship? A. From two to three minutes will stop her altogether.

Q. How long after the engines were reversed before the collision happened? A. Nearly four minutes. About four minutes.

Q. And you think her headway was checked for two to three minutes? A. Her headway was entirely checked before the collision.

Q. Was she making stern way or not, you think? A. She may have been making a little stern way.

Q. Your headway was entirely checked? A. Entirely checked.

Q. How about the speed of the Victory as she came into you? A. She came a good four knot speed.

Q. At the time she actually struck your vessel? A. At the time she struck us.

Q. What part of the vessel did she strike in respect to (524) being a strong or weak part? A. Struck us in what is supposed to be the strongest.

Q. She nevertheless caused so much damage you had to beach your vessel? A. Had to beach the ship.

Q. At the time the vessels came together did you observe buoy 7; how far distant were you from buoy 7? A. Close to the buoy.

Q. On what bow? A. Close on our starboard bow, and when she struck us, our ship must have been going little astern, and just as she struck us the buoy came close around our port bow.

Q. And only a few feet distant? A. Yes, sir.

Q. Your engines were going full speed astern at the time of the accident? A. Full speed astern at the time.

Q. What was done after the accident? A. The engines were put full speed ahead.

Q. How long after? A. As fast as I could get from the after deck to the bridge. When the collision occurred the pilot and me left the bridge to keep from getting killed, and as soon as the ships were clear the engines were put full speed ahead again.

Q. How long were you off the bridge do you imagine? A. I should say a minute, or a minute and a half.

(525) Q. The point of collision was right at the bridge? A. Right at the bridge.

Q. At what angle did those vessels come together? A. Angle of about 45 to 50 degrees.

Q. How much off your original course down the channel was your head at the time the vessels came into collision? A. From two to three points.

Q. How much off the course of the Victory was her bow at the time of collision? A. Near about the same.

Q. In other words you were moving port to port on what was practically a parallel course before those danger signals were exchanged? A. Yes, sir.

Q. And at the time of collision your vessel had come over two or three points off your course, and the Victory two or three points off her course, you say the angle of collision was 45 to 50 degrees? A. Yes, sir.

Q. And the scene of collision was almost on buoy number 7? A. Yes, sir.

Q. Being immediately upon your starboard bow at the time the ships came together, and either from the effect of the tide, or the shock of the collision of the engines, it came on your port bow after the collision? A. Yes, sir.

Q. Did you see any sail vessels ahead of the Victory so
(526) as to obstruct her passing—? A. There was one schooner.

Q. What was her position? A. As near mid-channel as might be. The Victory, as far as I could see, might just as well gone one side as the other.

Q. How close aboard of that vessel did she pass, and what side? A. When the collision occurred that schooner was about 100 yards from us and the same from the Victory; from 100 to 150 yards.

Q. The Victory had undertaken to pass to the eastward of that schooner? A. Yes, sir.

Q. How was that schooner, was she north or south or the scene of the accident at the time? A. Just abreast of us. I didn't take much notice until after the accident had occurred, and she was then abeam.

Q. Being in that position, if she interfered in any way with the Victory, would she not have equally interfered with your movements? A. Exactly the same. We couldn't starboard any more than he could port; nothing whatever to interfere with the Victory's movements at all.

Q. Then, as I understand, the vessels would have passed each other port to port without accident, and easily, until you heard the cross signals given by the Victory, and her movement under what seemed to be starboard helm? A.
(527) If the Victory had slightly ported instead of starboarding the ships would have passed clear.

Q. If she had continued in her course how would she have passed in respect to the schooner? A. Clear. Slightly ported for the schooner and cleared her and cleared us.

Q. After slightly starboarded she—A. Could have ported then and cleared us and cleared the schooner; she had no occasion to starboard for the schooner at all.

Q. Instead of that she continued under starboard helm into your vessel? A. Yes, sir.

Q. There is no doubt in your mind but what your vessel's headway was entirely checked? A. Entirely checked.

Q. Nor is there any doubt in your mind that the Victory was making considerable speed—what you estimate as four knots? A. None whatever.

Q. I understand you heard no signals from her until you had blown three single blasts? A. Yes, sir.

Q. Then you heard a cross signal? A. Yes, sir.

Q. Then you gave the danger signal and put your helm

hard-a-port, she giving three signals and reversing her en-
(528) gines. A. Yes, sir.

Q. Was anything done either by yourself or by the pilot navigating your vessel that was wrong or that contributed to the collision, in your opinion? A. Nothing whatever.

Q. Everything was done— A. That could possibly be done. In navigating narrow waters ships coming up go one way, and going down they keep the other. The Victory was on the east side when she should have been on the west.

Q. You know nothing of what part of the channel she was navigating down in Hampton Roads? A. No, sir.

Q. When you first saw her she was in what you think was the mid-channel? A. Yes, sir.

Q. You proceeded down your proper course on the east side? A. Yes, sir.

Q. Did you at any time approach the west side or go down the mid-channel? A. Never went to the mid-channel.

Q. You passed close aboard buoy 9? A. Yes, sir.

Q. And immediately straightened down the river and kept on the east side of the river? A. On the east side.

CROSS-EXAMINATION.

(529) By Mr. SHARP:

Q. You say, captain, that it was the duty of the Victory from the time she passed Craney Island, all the way up, to keep on the west side of the channel? A. No, I don't say from the time she passed Craney Island. I say from the time she got under way in Hampton Roads up to Lambert's Point she ought to have kept on the west side of the channel.

Q. You say it was her duty from the time she hove anchor in Hampton Roads to Lambert's Point to keep on the west side of the channel? A. Yes, sir.

Q. And it was the duty of the Plymothian— A. Or any other steamer to keep down the eastern side.

Q. We are speaking of the Plymothian. It was the duty of the Plymothian to keep on the east side going down, under all circumstances? A. Yes, sir.

Q. Under all circumstances as to each—that is your idea of the way that river ought to be navigated? A. Yes, sir.

Q. Whether practical or not? A. There are states of danger when you have to vary from your course to save a collision.

Q. Did you see the steamers—the three river steamers—

going down ahead of you? A. I saw them pass down before I passed the Lambert's Point pier.

(530) Q. Never saw them after that? A. No, didn't see them after that; they went down ahead of me—before I left the pier.

Q. You saw one schooner, and you had not noticed her until immediately before the collision? A. I saw the schooner at the time of collision. I would have noticed her if I had passed her.

Q. You say the first you noticed her was when you were close aboard of her? A. I didn't say close aboard of her.

Q. What did you say? A. About 100 yards of her.

Q. That was the first you saw of her? A. Yes, sir.

Q. She was going down the river? A. Yes, sir.

Q. In mid-channel? A. About mid-channel. I couldn't say exactly.

Q. You were on the lookout? A. I was on the bridge.

Q. You never reported that schooner to the pilot? A. I did; we both saw her.

Q. You both saw her when you were 100 yards from the collision? A. You vary your questions very much, Mr. Sharp. When two men are on the bridge and both see her, who is the report to be made to? He report to me, or I report to him?

(531) Q. Did you have any conversation with him about that schooner? A. We didn't have any talk at all, because she was well clear of us.

Q. But you didn't see her until you were within 100 yards of her? A. I might have seen her, but didn't take particular notice.

Q. The navigation of the Plymothian, then, was not directed with reference to that schooner? A. None whatever.

Q. And you think the navigation of the Victory should have been directed without reference to that schooner? A. Without any—

Q. Was the navigation of the Plymothian directed with reference to any other vessel? Q. None whatever.

Q. The only consideration was to keep on the eastern side of the river? A. And keep clear of the Victory, and give her the right signals.

Q. That is another matter. I am speaking of the helm. The only navigation as far as the helm was concerned, was to keep on the east side of the river? A. Yes, sir.

Q. You determined to do that under all the circumstances that existed then? A. Yes, because there was nothing in

(532) the way to keep us from going there.

Q. Was there nothing on the western side? A. We

didn't look for anything there. The east side was clear and we were going down the east side.

Q. Did you look down the west side? A. No, sir.

Q. And don't know whether it was clear? A. No, sir.

Q. Do you remember looking down the west side of that channel from the time you left Lambert's Point until the collision occurred? A. I looked right straight down the channel.

Q. When? A. All the time.

Q. You have previously stated you looked down the east side? A. I said I looked right down the channel and saw the east side and the west side.

Q. What did you mean by saying you looked down the east side of the channel? A. The east side was our proper course. I looked down there more especially to see that it was clear.

Q. So, as you were bound to go down the east side of the channel, your attention was exclusively directed as to whether that side of the channel was open? A. More especially to that side; yes, sir.

Q. And you say that that side was open? A. That side was open and clear.

(533) Q. How far down, to Craney Island? A. To Craney Island when I first saw the Victory, near Craney Island from rounding buoy 9.

Q. She was then— A. Near Craney Island.

Q. Before or after passing? A. About Craney Island. I couldn't say.

Q. The Victory, then, was not upon the east side of that channel from Craney Island up to the collision until just before the collision? Q. She was coming up, as near as I can say, about mid-channel, with our port sides open on each other—a little on our port bow.

Q. The Victory was coming up the mid-channel and you were on the east side of the channel? A. That's the situation of the two ships after we rounded number 9 bouy. The Victory was a little on our port bow all the time.

Q. How many points? A. I don't know exactly how many points she was; I could see the side. We didn't take the bearing by the compass in that case. A seaman at sea can see a ship, whether he is going to clear her or not.

Q. She was more on your port bow when passing buoy 9 than afterwards? A. She was on the port bow all the time.

Q. She was more or less on your port bow after you went (534) below buoy 9? A. She was coming up about the same until we heard her two whistles and saw her starboard her helm.

Q. She was coming up the mid-channel, then, all the time until you got the two whistles? A. Yes, sir.

Q. And at that time she starboarded? A. Yes, sir, and went across the channel.

Q. And those two whistles were given after you sounded the third whistle? A. After we sounded the third of our single blasts. As soon as the two whistles were blown we sounded our danger signal and put our ship full speed astern.

Q. You left Lambert's Point under port helm, slightly aport? A. Under port helm.

Q. The helm had been hard-a-port simply for the sake of getting out of dock? A. Wasn't put hard-a-port.

Q. The wheel of the Plymothian—? A. Was a-port.

Q. But never put hard-a-port from the time she left the pier until she reached buoy 9? A. Until she got to buoy 9.

Q. You have stated that the tide could not be felt before passing buoy 9, on account of the breakwater? A. I didn't state any such thing. I said the tide could not be felt until you passed the breakwater.

(535) Q. The tide cannot be felt until you leave the breakwater on leaving the dock, suppose in that condition that the Plymothian had started from Lambert's Point under port helm, wouldn't she have run upon the mud—with helm hard-a-port? A. I didn't tell you she started with helm hard-a-port.

Q. Suppose it was? A. If she had started with her helm hard-a-port she would have come inside the buoy.

Q. If she had left Lambert's Point with helm hard-a-port, she would necessarily have gone inside the buoy and struck upon the bank? A. Have gone on the bank.

Q But she left Lambert's Point with helm slightly a-port? A. Yes, sir.

Q. And with helm slightly a-port she passed within 20 or 30 feet of buoy 9? A. When she came up right to buoy 9 the helm was put hard-a-port to come around; when the bow got close to buoy 9 the helm was put hard-a-port.

Q. And she quickly responded to her helm? A. Yes, sir.

Q. And passed— A. Yes, sir, close to buoy 9.

Q. Under helm hard-a-port? A. Close to buoy 9.

Q. And didn't run aground? A. No, sir. As soon as (536) she was around number 9 buoy and straight down, the helm was steadied. You know how she came out—

Q. I know you came out with helm slightly a-port and not hard-a-port— A. That is what I said.

Q. All vessels ought to do that thing? A. Yes, sir.

Q. All vessels ought to come up with helms slightly a-port with a flood-tide? A. Yes, sir.

Q. You had a flood-tide? A. Yes, sir.

Q. Wasn't it a strong flood-tide? A. The tide, as far as I could make out, was running about two and a half knots.

Q. Want it what you would call a strong flood-tide? A. We wouldn't call it a strong flood-tide; I don't know what you would call it here; sometimes the tides in England run seven or eight knots.

Q. On this occasion it was a strong American tide? A. It was a moderate tide.

Q. A moderate American tide? A. I don't know. The tide runs strong. It was flood-tide. I know that much.

Q. You have stated in the answer sworn to by yourself that it was a strong flood against her; is that true or (537) not? A. That is true; the tide was against her.

Q. The tide was strong flood? A. I don't know about strong—it was about two and a half knots.

Q. You think it was moderate? A. You can put it strong or moderate, two and a half knots.

Q. Is that answer true or not, when you state it was a strong tide? A. Yes, sir, a strong tide, that is—

Q. And the helm was put amidships? A. The helm was steadied.

Q. Now, captain, give specifically and in detail every order that was issued by you or by the pilot to the engineers? A. On leaving the berth the engines were put slow ahead; then stopped for perhaps half a minute, just until the ship's stern was clear of the end of the wharf so it wouldn't strike our propeller; then put half speed ahead; then full speed, and then kept full speed.

Q. Those were all the orders to the engineer? A. Those were all the orders that were given, that is, until the order to stop her again at the time of collision. I have not got that far yet.

Q. Well, put it down. A. At the time of collision it was full speed astern, before the collision, and after the collision it was full speed ahead.

(538) Q. At what time did she pass buoy 9? A. She left the pier at 4 o'clock. I suppose she passed buoy 9 at 3 minutes past 4.

Q. What did she do at 5 minutes past 4? A. She was going down the river.

Q. What order was given at 5 minutes past 4? A. I don't know any particular order at 5 minutes past 4.

Q. Was any order given at 5 minutes past 4? A. I don't know.

Q. Was any given between 5 minutes past 4 and 10 minutes past 4? A. I don't know as far as the engineers are concerned.

Q. Was any given at 10 minutes past 4? A. At 10 minutes past 4 the orders were full speed astern.

Q. You stated you didn't know what orders were given to the engineers?

By Mr. HUGHES:

He has just put them down.

A. At 10 minutes past 4 the order was given to go full speed astern.

Q. How long was the Plymothian moving under the order to go slow; how many minutes? A. From leaving Lambert's Point?

A. After passing buoy 9 how long was she moving under the order to go slow? A. She got no order to go slow.

(539) Q. To go half speed, then? A. Leaving the pier we went slow, then half speed, and then full speed, passing buoy 9 at full speed.

Q. Full speed from buoy 9 until the collision occurred? A. No, full speed astern at the time the collision occurred.

Q. Well, until you gave the order for full speed astern? A. Yes, sir.

Q. What is her speed under full speed? A. Under full speed? She was going at that time about seven knots with two knot tide against her—about four or four and a half knots.

Q. That is from buoy 9 until the order was given at 4:10 to reverse the engines at full speed? A. Yes, sir.

Q. Now give the orders about the movement of the helm. What orders were given to the helmsman? A. On leaving, you mean?

Q. Yes, every order? A. I have already given them.

Q. You have given the orders to the engineers? A. I gave the orders to the helmsman as well.

Q. I will get you to put them down again. Give the orders given to the helmsman upon leaving Lambert's Point? A. Do you require the orders given twice, sir?

Q. Yes, sir, this time. A. Leaving Lambert's Point pier the order was given to port until we got the ship's bow to buoy 9; then the order was given to hard-a-port; then when (540) we rounded number 9 buoy the ship was headed straight up and down the channel, and the order was given to steady the helm, and the helm was kept steady to straighten down the east side of the channel until we had gotten down close—after the whistles had been blown, then the helm was ported a little while, and then when the last whistles were blown and the engines put full speed astern the wheel was put hard-a-port.

Q. How long was it before the collision when it was put hard-a-port? A. About four minutes.

Q. Your engines, then, were reversed at the time the helm was put hard-a-port? A. The danger signal was given at ten minutes past 4, and the engines put full speed astern and the helm put hard-a-port.

Q. The order, then, was to put the helm hard-a-port at the time— A. At the time the engines were reversed.

Q. It was not merely to port the helm, but hard-a-port? A. Yes, sir.

Q. That was four minutes before the collision? A. Before the ship struck us.

Q. Where was the ship when that order was given? A. Close to buoy 7.

Q. On the east side of the river? A. On the east side of the river.

(541) Q. How many points did that make the ship change her course? A. What?

Q. Putting it hard-a-port? Putting it hard-a-port and reversing the engines, I suppose, will change it two or three points. You know reversing the engines you put the helm the opposite way you want to go. We didn't want the ship to slew around quick, but to go astern. If we want the ship to slew around quick with sternway we put the helm hard to starboard. But we wanted to go straight back astern.

Q. Suppose a ship is actually moving backward through the water, what is the effect of putting the helm to starboard? A. Cant her the opposite way.

Q. That is the proper thing to do, then, to make a ship's head cant to port, to put the helm to starboard? A. Yes, sir. If you want the ship's head to go from port to starboard you put the helm a-port; if you want it to come this way you put it to starboard.

Q. If a ship is going ahead and you put the helm to starboard which way will it make her head cant? A. To starboard.

Q. Then, if a steamer is in the act of backing, and has been backing for some time, and wants to keep her head off the land, and the land is to the east of her, and she is moving south, she ought to put her helm to starboard? A. Yes, sir.

Q. That is the proper movement? A. Yes, sir; that is (542) if the ship has got sternway. She will feel no effect of that helm until she is going astern.

Q. You stated the collision occurred very close to buoy 7? A. Yes, sir.

Q. How far from buoy 7, at the first of the collision, was it? A. When I left the bridge the buoy was close to our

starboard bow, and when the collision was over it was on our port bow.

Q. When the vessels struck, how far was your vessel to the west of the buoy? A. Not fifteen feet to the west.

Q. At the time she struck? A. Yes, sir. I didn't stop on the bridge when the collision occurred, because I might come off quicker than I wanted to. When I left the bridge the buoy was about twenty feet from the starboard bow. After the collision occurred, when I got on the bridge again, the buoy got on our port bow.

Q. But you say the collision occurred about twenty feet to the west of the buoy? A. About that.

Q. To the north and west of the buoy? A. Yes. sir. At a time like that, you know, Mr. Sharp, you have'nt any time to measure feet; you have something else to look after.

Q. And you say the Victory had abuntant opportunity (543) to port her helm and keep out of the way of the Plymothian? A. Plenty of room, plenty of opportunity.

Q. That is was just as easy for the Victory to port her helm as for the Plymothian to starboard? A. Far easier.

Q. Didn't you say it was just as easy? A I might have said so. It was easier for the Victory.

Q. Why? A. Because he being on our port bow, he could have ported and gone off this way.

Q. Did you in your examination in chief use the expression "it was as easy for the Victory to port her helm and get out of the way"? A. I don't think I said it.

Q. I recollect you did say so. Suppose you did say it. Now, sir, could the Plymothian by starboarding her helm at any time for four minutes preceeding that collision, have gotten out of the way of the Victory? A. No.

Q. Why? A. On account of our port bow. We would have gone into him.

Q. But you stated she was moving over to the east side of the river? A. I don't think I said that.

Q. You said the Victory was in mid-channel, and moving under starboard helm to the east side of the river. Why did you not starboard your helm and clear her? A. I have (544) the right of way to the east side of the river. We gave him one signal for port and ported and kept a port helm. If we had starboarded after blowing one signal, we would have been to blame.

Q. Then it was the principle of being blamed if you had starboarded your helm— A. No; if we had starboarded our helm and he starboarded his helm, we would have run clear.

Q. You have stated that he was moving under starboard helm? A. Yes, sir.

Q. How wide is the channel there? A. Somewheres near 400 yards.

Q. You had 300 yards to the west of you? A. Yes, sir.

Q. What was to prevent the Plymothian from keeping out of the way of the Victory when you had 300 yards to the west of you? A. What was to prevent the Victory from doing the same thing?

Q. I understand that you were prevented by the consideration that you had the right of way— A. And gave him the right of way signal.

Q. I now say, leaving out of consideration the fact that you had the right of way, was it a difficult thing to do to pass to the west if you had not been moved by the right of way to pass to the east? A. If there was no right of way there would be nothing else but collisions. If you (545) make a right of way and don't stick to it what is to prevent collision?

Q. But you say you took no notice of the schooner that was between the Victory and Plymothian until you got within 100 yards of the Victory? A. Yes, sir.

Q. Did you conduct your navigation without reference to that fact? A. There was plenty of room for the Victory to have ported his helm.

Q. Your idea is the proper navigation was for the Victory to have passed between that schooner and the eastern shore? A. Between the schooner and the Plymothian?

Q. And the Plymothian to pass between the Victory and the buoy? A. The Victory and the eastern shore.

Q. Your idea, then, was to have the three vessels all jammed up on the eastern edge of the river? A. They were not jammed up; there was plenty of room.

Q. Your idea is that the proper thing to do was to have all those vessels jammed on the eastern side of the river, when the western side was clear? A. My idea was there was plenty of room between the buoy, the Plymothian, the Victory, and the schooner for all three ships, if the Victory had been properly navigated, to have plenty of room and all gone clear.

(546) Q. Suppose your vessel had been upon the western side of that channel, say from anywhere before four minutes preceding the collision—suppose you had been over on the western side, was there anything to prevent your going down the western side? A. If I had been on the western side of the channel I should have taken notice on that side to see if there was anything; but as we were not over there and saw the eastern side was perfectly clear, and didn't think at first of the other ship passing from mid-channel to the eastern shore.

Q. You have stated that in consequence of your always holding the eastern shore you didn't take notice whether you could go down the western shore? A. Didn't take particular notice.

Q. You say if you has been on the western side, your first thought would be to observe whether the western side was clear and then have gone down the western side? A. If I had been on the western side, the first thing I would have thought of, was, the first clear space to get to the eastern side. I know I was on the right side in the right of way and clear of ships.

Q. Then you did the same thing you would have done if you had been on the western side? A. I would have done—.

Q. If you had been on the western side, above or below buoy 22, would you have crossed over? A. If there was (547) anything in the way I certainly would not have crossed over; but as the ship never was over there I never like to say anything now in the way of any—.

Q. Suppose your vessel had been on the western side of the channel above or below buoy 24, would you have kept down the west side, or gone over to the east side? A. I have answered that before. I said if I was on the west side, the first chance I would have crossed over to the east side and gone down the east side.

Q. You would not have gone down the west side, even if it had been clear? A. No, sir.

Q. Your idea of your duty was, even if you were on the west side—? A. If I was on the west side and there was nothing in the way I should keep in the mid-channel, and as soon as I saw anything coming up I should keep on the east side.

Q. What consultation did you have with the pilot on that day in reference to going down the east side? A. Had none.

Q. Did you express those views to him? A. No, sir.

Q. Did he communicate to you what the rule was in regard to the western side? A. He did not communicate to me because he knew I knew as well as he did.

Q. How did you acquire that information? A. By ten (548) or twelve years in this country, being here several times and at Newport News.

Q. Your idea is— A. By the United States law a ship going down—

Q. State the law? A. Coming up leave the red buoys on the starboard bow, going down keep the black buoys on the starboard bow.

Q. You think, then, when a vessel is on the west side of

the channel and wishes to go down that she would have the right to signal a vessel on the other side, one coming up and the other going down, that she would pass across the channel and go down the eastern side? A. Not if there was danger of a collision.

Q. Suppose she was a half a mile off? A. She has got the right.

Q. Suppose she was a third of a mile off? A. I don't know. That is getting pretty close.

Q. Well, two-fifths of a mile? A. I don't know about that.

Q. Which ought she to do in crossing, pass astern of the other vessel or across her bow? A. Pass across her stern, certainly, and then go across.

Q. It would not be right to cross her bow in doing it? A No.

Q. Then, if a vessel should be on the west side and move over to the east side to go down that side of the river, and attempt to pass between that steamer and the land, that (549) would be a violation of the law, in your judgment? A. It would be in anybody's judgment; but when these is plenty of room and there one signal is given, there is no vessel has the right to give cross signals.

Q. But would it be a cross signal for one vessel on the west side to give a signal to the vessel on the east side that the one on the west side was about to cross to the east shore, would the vessel have the right to give one signal and pass port to port? A. They would not go straight across.

Q. Suppose this case: Suppose that another vessel that wan't the Victory—a vessel called the Tom Jones, if you please—was off buoy 9, and that she should see down the river a vessel called the John Smith on the east side of the river coming up, and they were half a mile apart, would the Tom Jones have the right to give a signal of one whistle to the John Smith that the Tom Jones would cross the channel and pass between the John Smith and the land? A. In the position you give those vessels now it is perfectly right. One is at buoy 9 and the other half a mile down. The one at buoy 9 would have a perfect right to give one signal.

Q. Suppose one was out off buoy 24, I meant 24 just now not number 9. Suppose one was off buoy 24 on the west side of the river and should sight another vessel coming up the river on the east side or the middle of the channel, (550) would the vessel that wished to go down the river, then being off the Merrimac buoy, have the right to give one signal to the other vessel? A. If he saw it was prac-

ticable to go down the river and clear the other vessel he would have the right.

Q. If he found it practicable there would be no damage; but suppose there was a collision? A. It would depend on how she used the helm—it depends on which gives those whistles.

Q. It all depends on which gives the first whistles? A. That is what I have been given to understand.

Q. Your idea of the law is, that the one that gives the first signal has the right of way? A. That is my understanding of it.

Q. That is the absolute law governing the case, and that law is applicable to vessels not meeting end on, but at an angle to each other? A. Well, it would not be done at that angle.

Q. Do you understand that rule to apply to vessels meeting end on or not? A. Meeting end on; if not meeting end on the vessel that gives the first signal has the right of way.

Q. Then the one that gives the first signal has the right of way if they are not meeting end on? A. If there was one ship there, and one here—

Q. Suppose one is on the west side of the channel, and the other coming up the middle of the channel, would the (551) one on the west side have the right to give one signal to the one in the middle of the channel? A. It depends upon the distance apart.

Q. Say half a mile? A. I would do it.

Q. That is your idea of the case? A. If I saw it could be done without danger.

Examined by Mr. MYNDERSE:

Q. When you rounded buoy 9 and steadied down the river how far were you from the east side of the channel? A. We passed within 20 or 30 feet of buoy 9.

Q. Then as you steadied, how far were you from the edge of the channel? A. I shouldn't think more than 30 or 40 yards.

Q. And then you ported the helm to hold that edge of the channel? A. Yes, sir.

Q. Until the emergency arose under which you hard-ported. And at the time the order was given to go full speed ahead you were rounding the buoy, or just before? A. That is as the buoy came to the bow, the order for full speed ahead and the helm hard-a-port.

Q. You did not keep a note of the exact time? A. No, sir.

Q. If the engineer made a note in his log of 4:05— A. That is right.

(552) Q. What kind of a propeller have you? A. Right handed.

Q. That is, when you are going ahead it turns from port to starboard? A. Yes, sir.

Q. And you say your speed after leaving buoy 9, while proceeding down the channel, was four and a half or five knots? A. It would be about seven through the water.

Q. And this speed of four and a half to five, is over the land? A. Yes, sir.

Q. If you were coming up the channel from Hampton Roads, and saw a vessel coming out from Lambert's Point pier dock, which side of the channel would you assume that vessel would take after she got steady? A. Down the east side.

Q. You would expect her to go down the east side? A. Yes, sir, and act accordingly.

Q. You noticed the position of this schooner about the time of collision? A. Yes, sir.

Q. And she was then about abreast of you? A. Abreast of the two ships.

Q. And distant 100 to 150 yards? A. Yes, sir.

Q. Would that allow space for the Victory to pass be-
(553) tween you and the schooner? A. Yes, sir, and another *on* besides.

Q. But so far as you were concerned, were you as close to the east side of the channel as you could get? A. As we could possible get, unless we went ashore.

RE-EXAMINATION.

By Mr. HUGHES:

Q. At the time you sounded your first whistles was it not perfectly practicable for the Victory to have ported her helm and passed to the west of the schooner? A. That I didn't take notice of, but after the whistles were sounded it was perfectly practicable for the Victory to have ported and passed between us and the schooner.

Q. Was the order for full speed ahead given before you got to buoy 9, or after? A. Just as we got to buoy 9.

Q. You didn't take the exact time you were making between the time you left the pier and the time you went full speed ahead? A. No.

Q. You estimate it to be about three or four minutes? A. Yes, sir.

Q. But the exact time that order was given is recorded by the engineer, and that is more correct than any judg-

ment you can give? A. It should be. They have a clock (554) there and the engine in their hands, and they have a better opportunity than we have.

By Mr. MYNDERSE:

Q. Was there any cargo in the vessel at the place where the Victory struck her? A. Yes, sir, cotton in the lower part and coals in the upper part.

Q. How had it been put in? A. Screwed in.

Q. Compressed cotton? A. Yes, sir.

Q. What kind of backing would that make for the steamer? Would it be solid? A. I should think it was.

Q. How much of a wound did the Victory make in the Plymothian? A. Stringer plates two feet wide with angle irons against the ship's side 4 by 5, another angle iron in there on the inside of the stringer plates; that is on the main deck; another on the upper deck, and another on the lower deck. She went through all three.

Q. She cut through the stringer plates and angle iron, outer angle iron? A. Yes, sir.

Q. And stopped on the inner angle iron? A. Yes, sir.

(555) Q. Did you have any photographs taken? A. Yes, sir.

Q. Who took them? A. A man by the name of Doolittle, I think it was; a man at the Dry Dock.

Q. You loaded your vessel at Galveston? A. Yes, sir.

Q. And entirely with cotton? A. Yes, sir.

Q. Who were your agents there? A. Moller & Sweeney.

Q. Do they maintain anything like a line of boats? A. No. Just regular charterers of boats. They are agents of some of these American boats.

Q. The old firm was J. Moller & Company? A. Yes, sir.

Q. Now it is Moller & Sweeney? A. No, it is J. Moller & Company now; Sweeney is to give it up on the 1st of January. Sweeney is one of the Company.

By Mr. HUGHES:

Q. You have been asked a good many questions as to what you would do if you were on the west side of the channel and saw a vessel coming up on the east side of the channel. It would all depend on what moving space the vessels had and what roadway, whether fair or not? A. Certainly.

(556) Q. Your object would be at the first fair opportunity to pass over to the east side? A. I think that is what I mentioned.

Q. And that is what you mean? A. I think that is what

I mentioned. If I was on the west side, the first opportunity I had I would go to the east side.

Q. You mean you would not go over if you saw it involved any risk of a collision? A. Yes, sir.

Q. And only go when it was safe and practicable? A. Yes, sir.

(557) Extract from copy of entry in Engineer's Log of S. S. "Plymothian," for the 12th of November, 1891, voyage from Galveston to Liverpool:

"Stand by at 1:50 A. M. Stopped for pilot at 1:55 A. M. Full speed 2 A. M.

Hours. A. M.	No. of Fires.	Pressure of Steam in Boilers.
2	6	83
7	6	80
11	6	75
P. M.		
3	6	80

Brought up and anchored 4 A. M. Steam, &c., kept handy. Weighed anchor and proceeded 6 A. M. Full speed 6:10 A. M. Worked engines to order into coaling berth and finished 7:15 A. M Commenced coaling 8 A. M. Finished do. 1:15 P. M. Hands employed sponging tubes and cleaning fires, &c., &c., &c. Pumped out after ballast tank. Received 287 tons of coal on board. Stand by to order 4 P. M. Full speed 4:5 P. M. Full speed astern 4:10 P. M. Ship struck 4:14 P. M. Full speed ahead 4:15 P. M. Stopped 4:20 P. M., ship having collided and beached to prevent her sinking. Making a lot of water in E. room; started donkey, and up to 5:50 P. M. was keeping E. room clear; 6:30 P. M. water commenced to gain on us very rapidly. Started main engine ahead, using bilge injection and all pumps in E. room bilges. Water, however, gained on us and put out the fires. Closed down water-tight door leading into tunnel. * * * *

(S'd.) GEO. A. SCULLARD.

EXHIBIT "A."

(558) Extract from copy of chief officer's log SS. "Plymothian" of entry of the 12th of November, 1892, voyage from Galveston to Liverpool.

Commences with light breeze and fine clear weather.

2 Cape Henry light abeam S. W. Dist. 3 miles.

4 came to an anchor in Hampton Roads in 4 fthms water and 30 fthms chain on port anchor.

Draught of water on arrival at Norfolk: for'd 12 ft. 00 in., aft 15 ft. 00 in.

6:15 weighed anchor and proceeded towards Lambert's Point, engines working as required.

7:30 arrived at Lambert's Point, Norfolk, and moored ship alongside wharf. 8 commenced coaling.

1 finished coaling. 3:50 pilot, R. Henley, came on board; steam ready, unmoored from wharf. 4 P. M. left the wharf and proceeded down the river (engines working as required); saw a steamer coming up; blew our whistle once, and kept our helm to port, receiving no reply from steamer; blew our whistle a second time, still getting no reply, gave her the signal third time, and was answered by two whistles, and to try and avoid a collision, blew our whistle three times, and put engines full speed astern, but she came on and struck our vessel on fiddle deck in cross bunker, cutting her from the rail to below water line; immediately put engines full speed ahead and ran ship ashore for the safety of the ship and cargo, to prevent her from sinking; got tug "Commodore" to run our anchor out to prevent ship (559) from sliding off into deeper water. Kept the pumps going until when the water rose and put out fires.

Found the other steamer to be called the "Victory," of

EXHIBIT "B."

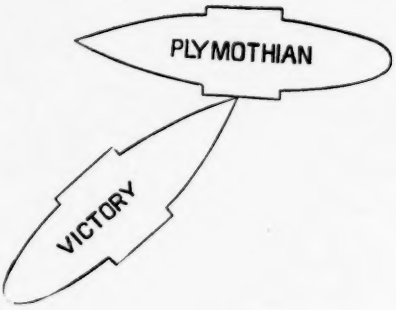


EXHIBIT "C."

EXHIBIT "D."

(562) The deposition of WILLIAM SWAIN, a witness on behalf of the steamship "Victory," taken on Thursday, November 3rd, 1892:

WILLIAM SWAIN, being duly sworn, testified as follows:

Examined by Mr. SHARP:

Q. What is your name, age, residence and occupation? A. William Swain, master of the barge "Storm King" of Boston, residence Bath, age 49.

Q. State how many tons of coal the Storm King carries. A. 1850.

Q. Was she the old ship "Storm King? A. Exactly.

Q. How long have you been following the sea? A. From the best of my recollection I think it is about 32 years.

Q. How long as master? A. I have been master now permanently right along for the last six years; before that I was master off and on; master to the West Indies, and master of coasting vessels.

Q On the 12th of November, 1891, what vessel did you command and where was she? A. I commanded the Storm King. She was then lying at Lambert's Point.

(563) Q. What day was she loaded? A. I disremember, but she was about half loaded on the 12th.

Q. Do you remember the collision between the British steamship "Plymothian" and the British steamship "Victory"? A. I do, sir.

Q. When did it happen? A. It happened November 12th, between 3 and 5 o'clock in the afternoon.

Q. November 12th of what year? A. Last year—'91, sir.

Q. The Storm King at 4 o'clock P. M. was lying where? A. The Storm King between the hours of 3 and 5, or nearly 4 o'clock, was taken in tow by the tug "Commodore" and towed to the west side of the channel to an anchor there to wait until there was coal enough to finish loading her, having at that time about half of my cargo in.

Q. You say to the western side of the channel; how far to the west? A. Well, just far enough from the western bank to get a good berth—a good chance to swing.

Q. Was she, then, near the western bank or far from it? A. She was just about a good berth from the western bank; that would be room to put out about 50 fathoms of chain without touching the bank provided she was just tailing for it.

Q. On which side of the pier was she lying before she went over to the western side of the channel? A. She was lying on the south side of the pier; had been lying on the

south side of the pier but had dropped into the middle of the dock to make room for tramp steamers, and had laid the best part of the day in the middle of the dock—out from the dock you know. What I mean by the middle of the dock, there are two piers and I lay between the two and dropped anchor.

Q. The Commodore took the Storm King from that dock and carried her to the western side of the channel and an-
(564) chored her there? A. She did.

Q. Was there any steamer on the north side of the pier; if so, what? A. There was; the Plymothian.

Q. Tell what you heard—what you know? A. At the time she was on the north side of the pier and had coaled up there, and at the time the Commodore was moving me out to anchor the Plymothian also came out just astern of me and on my starboard quarter.

Q. Which side of the channel did the Plymothian move to when she was moving on your starboard quarter? A. Well, when near number 9 buoy the Plymothian gave me two whistles, or tried to give me two whistles. They were very indistinct. I knew what it meant. It meant he was going to pass on my starboard side.

Q. Did you see where she went; if so, where did she go? A. After passing No. 9 buoy he proceeded down channel, or towards the western half of the channel. Finally, when I last noticed him, he was on the western side of the channel; not exactly on the western side, but on the western half of the channel.

Q. When you last noticed him in that movement? A. In that movement, yes, sir; of course my attention was called to anchoring my vessel, etc.

Q. The Storm King moved across and down the channel over to the western side? A. Yes, sir.

Q. And I understand you as saying the Plymothian did the same? A. He moved towards the western side of the channel—was on the western half of the channel.

Q. When she got to the western side of the channel what was the first thing she did? A. I couldn't say positively what was the first thing she did *was*. When she got out
(565) in the mid-channel, or the western half, she straightened up and straightened her course down the channel. What I mean by straightened down channel she straightened down towards Craney Island.

Q. Which side of the channel was she then moving while she straightened down? A. On the western half of the channel.

Q. Moving down the western half of the channel towards Craney Island? A. Yes, sir, that part of the channel being perfectly clear.

Q. At that time, as you looked down the western side of the channel, did you see any obstruction to the Plymothian's continuing to move down the western side of the ship channel? A. Nothing to obstruct her going on the western side of that channel.

Q. Did she continue to move down the western side, or what did she do after that? A. When she was nearly down to No. 7 buoy, I believe it was at that time, from the very best of my recollection, I at the time was in my boat, had left my vessel and was proceeding to Lambert's Point in my boat, when she ported her wheel and went for the east bank, the east side of the channel.

Q. You mean she crossed over the channel to the eastern side? A. She crossed over the channel to the eastern side, and hence the collision.

Q. Towards buoy No. 7? A. Towards buoy No. 7—it is now buoy 9. I went ashore and made the remark that her steering gear had given out right on the pier.

Q. That was the way it appeared to you at the time? A. That the steering gear had broken; something gone wrong with the steering gear.

(566) Q. You were in your boat crossing from the Storm King to Lambert's Point while she was moving down the channel after passing the Storm King, you were in your boat at that time, after she passed the Storm King? A. After he passed the Storm King I crossed to the Point side; you know he came out on my starboard quarter while the tug was pulling me out—it may be 4 or 5 minutes that the tug had hold of me, when I dropped my anchor and started ashore, told the men to pay out so much chain and left.

Q. And while you were in your boat you looked down the channel and saw her in collision with the Victory on the east side? A. Yes, sir, saw her before the collision took place, saw all this before the collision. As I was going ashore I noticed her, as I told you; I said her steering gear had given out, and I noticed her crossing to the east side of the channel. I noticed the inward bound steamer coming in—that was the Victory—and thought there must be a collision and I laid on my oars—I mean I stopped rowing, and looked right at them.

Q. On which side of the ship channel was the Victory moving? A. The Victory was coming up on the east side of the ship channel along the eastern shore.

Q. Did you see her at any time in the mid-channel? A. I did not.

Q. Did you at any time see her move from mid-channel towards the east shore? A. I did not.

Q. Did you see her at any time as if under starboard

helm, moving from mid-channel towards the eastern shore? A. No, sir.

Q. You saw the Victory, then, constantly keeping on the east side of the channel and coming up? A. I did.

(567) Q. Did you ever see the Victory attempt to cross the channel in any way? A. Not head first; I saw her attempt to cross it stern first. That was when she backed out to avoid the collision.

Q. Describe that? A. Well, when they were likely to have this collision the Victory back apparently to me with all possible haste and with all the speed she could; I saw her turning back and I thought she would clear and would not hit; she seemed to have stern way; I don't know as he did; the Plymothian was going so square across.

Q. You couldn't tell whether the Victory had stern way or not? A. I could not.

Q. By saying turning back do you mean the movement of the wheel or the backward movement of the vessel? A. I mean the way she made the water fly; he appeared to be rung up full speed astern.

Q. Her engines reversed full speed astern? A. Yes, sir.

Q. As it seemed to you? A. Yes, sir.

Q. But you couldn't tell whether she was making headway or not? A. No, sir.

Q. And she kept constantly on the eastern side of the channel? A. She did.

Q. Appear to be moving parallel with the channel? A. Appeared to be moving parallel with the line of the channel, well on the eastern side.

Q. When the Plymothian was crossing from the western side of the channel over towards the buoy No. 7, the scene of collision, could you tell whether she was moving rapidly or not? How did she appear to you? A. She appeared to be moving very quick.

(568) Q. You have stated that when off buoy No. 9 whistles were sounded from the Plymothian to you. Now describe them? A. I supposed they were intended for me; they might have been intended for the other vessel, but as he was going to come out on my starboard side he would naturally give me two whistles.

Q. And you took them to be for you? A. I took them to be for me; they may have been for the Victory.

Q. Were they loud? A. Very indistinct. If I hadn't known what it meant I shouldn't have known they were whistles.

Q. Suppose the Storm King had been as far from the Plymothian as the Victory was, could those whistles have been heard? A. No, sir.

Q. Were they sufficient whistles to give to a vessel as close as the Storm King then was to the Plymothian? A. No, sir, it was not, for this reason: any steam vessel that has got a whistle while lying at a dock condenses water in her pipe, and when you first blow it you have got to have a lot of water blown out first, and that was the trouble, the water hadn't been blown out; I suppose that was the trouble.

Q. Describe the whistle as you heard it; did it appear to be from that cause? A. It did. It appeared to me just as if the pipe was full of water; there was no whistle to it hardly.

Q. Did you hear the puffing of the steam? A. Yes, sir.

Q. But heard very little sound? A. I heard very little sound.

Q. After that moment of time did you hear any other whistles sounded from the Plymothian to any vessel? A. I did not.

Q. No other? A. No, sir.

Q. Did you hear any whistles in the distance from any other vessel than the Plymothian? A. I heard two whis-
(569) tles again.

Q. From what vessel, do you know? A. I couldn't swear, sir; don't like to say.

Q. How were they? A. It was from one steamer or the other—gave two whistles. I wouldn't say which one it was.

Q. Which two do you refer to? A. It was either one or the other, the Victory or the Plymothian.

Q. But it came, you say, from a distance? A. Came from a distance; very distinct.

Q. Came from towards the Victory or the Plymothian? A. Towards the Victory, but I wasn't looking in that direction at the exact moment.

Q. Came from towards Lambert's Point or Craney Island? A. From Craney Island.

Q. You don't know what vessel it proceeded from? A. I couldn't swear.

Q. You know you heard those two whistles? A. Yes, sir.

Q. And they were loud, clear, and distinct? A. Yes, sir.

Q. Think they were sufficient signal whistles? A. They were.

Q. Now in looking down the channel did you look down the channel to see if there was any vessel over on the east side towards that way, except the Victory? A. I did. I noticed a schooner, one three-masted schooner—a bay schooner. What I mean by a bay schooner is a boat with three masts without any topmast or jib-boom, that trade up in the bay. She was going down, and I think she was lumber loaded.

(570) Q. Which side of the channel was she on? A. Seemed to be just about mid-channel.

Q. At the distance you were from her, could you tell whether she was exactly in mid-channel or not? A. I could not, but she looked to be exactly or about in mid-channel.

Q. Supposing she was not in mid-channel, would she be to the east or the west of the channel, in your judgment? A. In my judgment she was in mid-channel; that is the only answer I can give to that, because the inward bound steamer was to the east of her.

Q. The Victory was to the east of her? A. Yes, sir.

Q. The Victory was in the east side of this channel and this vessel seemed to be about in mid-channel? A. Yes, sir.

Q. Going down or coming up? A. Going down.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. Who was captain of the Commodore when she towed you out on November 12th? A. I don't know his name, although I am well acquainted with him—a tall, slim man.

Q. What is he called down there if you don't know his full name? A. I don't remember. I am well acquainted with the man, but don't know his surname or even his given name.

Q. Was he the regular captain of the Commodore? A. Yes, sir.

Q. He was in charge of the tug that towed you out, was he? Q. Yes, sir.

Q. How far were you from the Plymothian at the time she blew two whistles near buoy No. 9? A. We were about (571) from 60 to 75 fathoms away from her, she gaining on me. She was on my starboard quarter and a little astern.

Q. How long after that was it before you came to an anchor? A. Well, it might have been between 3 and 5 minutes.

Q. You anchored in the western half of the ship channel? A. I did, sir.

Q. How long did it take you to come to anchor? A. From the time the tug hailed me to "let go your anchor" it might have taken me two minutes to get my anchor down and chain out—a minute and a half or two minutes.

Q. How long after that was it before you got into your boat? A. Got into my boat immediately after the anchor was down and the chain was out.

Q. Was your boat on the davits or was it— A. No, sir; towing astern; all I had to do was to haul her up and jump into her; the ladder was there and everything.

Q. Where were you when the anchor was let down, in the bow or stern of your vessel? A. On the top-gallant forecastle.

Q. And after the anchor was dropped you walked down aft and got in your boat? A. No, sir; the man at the wheel pulled the boat up amidships, to the ladder, and I got in.

Q. He towed the boat up amidships and you got in from the ladder? A. Yes, sir.

Q. How long is your boat, the Storm King? A. 196 feet over all.

Q. What length of cable did you have out? A. I don't remember exactly, but probably about 15 fathoms—my main chain?

Q. Yes, sir? A. Yes, sir; probably about 15 fathoms;
(572) not more than that—more or less.

Q. And you think when your vessel was tailing to the west she only had good berth-room from the western side of the channel—only swing well clear from the western side of the channel? A. Swing clear and had plenty of room.

Q. How much room? A. The boat had somewhere between 45 and 50 fathoms before she would take the bank provided she was tailing straight for the bank. We make that calculation in anchoring, sir.

Q. But she was tailing to the south and east at the time the anchor was dropped I imagine? A. Yes, sir, tailing to the south; tailing up the river.

Q. How far from the Merrimac buoy did you anchor—the red buoy on the west side; buoy No. 24 I believe it is now? A. I think I might have been 100 fathoms from it. That is almost impossible for me to tell.

Q. Were you to the north or south of an east and west line passing through buoy No. 9? A. I was to the north of an east and west line of buoy 9.

Q. How far to the north? A. Well, it would be impossible for me to tell that.

Q. Give your best recollection and judgment? A. To the best of my judgment I think I was about 300 fathoms.

Q. How did the Lambert's Point pier bear from you, and what was its distance? A. Its bearing I didn't take.

Q. Give your best judgment? A. But from the best of my judgment I think Lambert's Point pier, the north pier, bore about S. S. E.

Q. How far distant? A. I should judge from the best
(573) of my judgment from 600 to 700 fathoms.

Q. You have stated that the red buoy was about 100

fathoms distant from you? A. To the best of my judgment.

Q. In what direction? A. From the best of my judgment I should think it was due west from me; it may have been W. N. W.

Q. You think you were 100 fathoms to the east of the red buoy? A. Yes, sir; 100 fathoms clear of it.

Q. At the time of the collision how far across the river towards the pier had you gotten? A. I had got to mid-channel, and was waiting, lying on my oars.

Q. How far were you then from buoy 9 in your judgment? A. Well, from the best of my judgment I may have been 150 or 200 fathoms away from it.

Q. And about what was the direction of that buoy? A. From me at the time?

Q. Yes, sir? A. About S. S. E. to the best of my judgment.

Q. About on a line with you and the pier then? A. Yes, sir.

Q. And how far distant were you, therefore, from your barge? A. I may have been about 150 fathoms; I shouldn't think I was more than that. I was as near mid-channel as I could get.

Q. Did you see the Plymothian move out from the pier? A. I did not, sir. I never noticed the Plymothian until she was well out from the pier, as I had to give my attention wholly to my own vessel.

Q. You don't know, then, whether or not she whistled at the pier and upon leaving the pier? A. No, sir; I couldn't say; I never noticed her.

Q. How close to buoy 9 did she pass? A. She must have passed quite handy to buoy 9, because she went nearer to it (574) than I, and to the best of my judgment may have went—I went somewhere in the neighborhood of 150 feet from buoy 9 and she went nearer.

Q. And you think she went closer than you did? A. Oh; she went a great deal closer than I did.

Q. So she didn't go over 150 feet in your judgment? A. Well, call it 150.

Q. Passing the buoy on her starboard side of course? A. Yes, sir.

Q. It was at that time that you heard these whistles blown from the Plymothian? A. She blew me the two whistles (as I took them it was for me) before she got to buoy 9. I was about passing buoy 9 at the time.

Q. How far apart were those whistles? A. Oh; well, from the best of my judgment it might have been ten seconds—if you could call them whistles. They were meant for whistles.

Q. Do you know the distance from buoy 9 to buoy 7? A. I do not, sir.

Q. What is the distance from the Merrimac buoy up to Craney Island? A. I don't know, sir, but I should think from the best of my judgment it was seven-eighths of a mile.

Q. What is the distance from buoy 7 to Craney Island? A. I should call it six-eighths of a mile, from the best of my judgment; I don't know, though.

Q. How wide is the channel, in your judgment, at buoy 7? A. I think the channel is about 2,000 feet wide, sir, to the best of my judgment, from bank to bank.

Q. What buoy is there, if any, on the western side of the channel near and to the north of buoy 7? A. Between
(575) buoy 7 and the light-house.

Q. And Craney Island? A. There isn't any—wasn't at that time.

Q. You judged, as I understand your deposition, that the sailing vessel you saw was in the mid-channel from the fact that the incoming steamer, the Victory, was to the east of her? A. Yes, sir.

Q. And this is based upon the fact in your judgment, that the channel at that point is about 2,000 feet wide? A. Yes, sir, from the best of my judgment.

Q. You have stated that after passing buoy 9 the Plymothian, in your judgment, moved to the western half of the ship channel? A. Moved towards the western half after passing buoy 9.

Q. Did she at any time after passing buoy 9 reach the western half of the channel? A. She did.

Q. At that time how did she bear with reference to your vessel, which, as I understand, was at that time at anchor? A. She was nearly ahead of my vessel at that time.

Q. Nearly ahead of your vessel? A. Yes, sir.

Q. But on the starboard bow if anything? A. A little on the starboard bow.

Q. And you were at that time, in your judgment, 100 fathoms east of the Merrimac buoy and tailing south? A. Up river, yes, sir.

Q. That was the most western position to which the Plymothian ever attained as far as you know? A. Yes, sir.

Q. You have stated that your attention was occupied in anchoring and getting into your boat and getting out into the river, and that you could not tell which vessel sounded the two whistles which you afterwards heard? A. No, sir,
(576) I could not; they came from a distance.

Q. They came from a distance and in such a manner that you could not tell whether they were blown by the Plymothian or the Victory? A. I could not, sir.

Q. Those were the only whistles you heard blown by either or both of those steamers? A. They were all that I heard, sir, that I took notice of. They said there were other whistles blown, but I don't know.

Q. The fact of the business is you were not paying very close attention to the vessels until they got together? A. Until they struck?

Q. Yes. A. Yes, sir; I was paying strict attention, because I had stopped rowing and laid on our oars. Captain Clark, of the water-boat, also lay in mid-channel and stopped and looked when the two whistles were blown.

Q. Then you were in position to see and hear any whistles that were blown by those steamers, were you not? A. It seems I ought to, but I don't remember any whistles but those two.

Q. And those were the only two you heard? A. Yes, sir.

Q. And your recollection is as distinct on that point as anything you have testified to, is it? A. Yes, sir.

Q. When you were laying in mid-channel near buoy 9, how was the Victory heading with reference to your boat; that is, before the collision? A. Heading on a line with the east side of the channel.

Q. Were you not about head on to her? A. No, sir; I was broadside on to her. My boat was broadside on to her.

Q. Your boat was broadside on to her when you were at (577) No. 9 buoy and she was in mid-channel? A. Are you speaking of when I was in the row boat or the vessel?

Q. Speaking of when you were in the row boat? A. When I was in the row boat in mid-channel I was lying broadside to the Victory.

Q. Do I understand you to seriously testify when you were in your boat in mid-channel at buoy 9 that you were lying broadside to the steamer Victory heading up the river at buoy 7? A. Heading up the river at buoy No. 9.

Q. Heading up the river at buoy 7, the Victory was at buoy 7, and the collision occurred at buoy 7? A. Yes, sir; but at this time I am in my boat between buoy 9 and my vessel, in mid-channel. I want that distinctly understood.

Q. That is what I put in the question, sir. Do I understand you seriously to testify that when you were in your boat in mid-channel at buoy No. 9 that you were lying broadside to the steamer Victory heading up the river at buoy 7? A. I do, sir.

Q. And you testify that the Victory was on the east side of the channel coming up the river? A. I do.

Q. And below buoy No. 7? A. I do.

Q. How was she heading? A. Heading on a line with the east bank of the channel.

Q. What course, in your judgment? A. I couldn't give it, but to the best of my judgment I think she may have been heading about southwest.

Q. If she was heading southwest, and your boat was broadside on to her, how did your boat bear from her? A. My boat would bear by compass from her southwest; that is, by the Victory's compass, from the Victory, to the best of my judgment.

(578) Q. Captain, I would like for you to understand this examination at this point; you are in some way mixed, whether intentionally or not, of course, I don't know. I think you must be mistaken in some of your courses. If the Victory is heading southwest and your boat is bearing in your judgment southwest, how can your boat be on the broadside of the Victory as you have testified? A. I haven't testified—

Q. I beg your pardon. A. I beg pardon; I testified that I was broadside to the Victory; the Victory was pointing to my broadside.

Q. That is what I have been asking. A. You put it that my boat was pointing at her broadside; give it as it was.

Q. You have misunderstood my question and I wanted to get it straight. A. That's right.

Q. You said the Victory was heading southwest? A. Yes, sir, the Victory's stem was pointing to my broadside, not my stem pointing to his broadside.

Q. So you were directly head on to the Victory; your boat was immediately ahead of him? A. Up river of him, yes, sir, ahead of the Victory.

Q. You were directly in his course? A. Yes, sir, or nearly so, to the best of my judgment.

Q. And whichever has misunderstood the other in the preceding questions, you now state that your boat was directly in the course of the Victory. If she had continued the course in which you saw her just before the collision, that is, she was heading directly towards you? A. My boat was in mid-channel; he was heading about for my boat and on a line with the eastern bank of the channel; (579) but when he comes up this channel he has got to round buoy No. 7. There was a shoal point between my boat and the Victory.

Q. And he continued that course up to the time of the collision, did he? A. Yes, sir.

Q. How in the meantime did the Plymothian move with reference to you and the Victory? A. The Plymothian went on the west half of the channel, to all appearances

put her helm to port and crossed over to the east half of the channel, so much so that I went ashore at Lambert's Point and said her steering gear had given out—made that remark on the pier.

Q. The Victory struck the Plymothian on her port side, did she not? A. I think the Plymothian struck the Victory—I couldn't swear; I was not on that side where I could see. The Plymothian came between me and the Victory.

Q. The Plymothian, then, before the collision came between you and the Victory? A. Yes, sir.

Q. And it was in this position that you made the observations respecting the collision to which you have testified? A. Yes, sir.

Q. How far were you from the point of collision, in your judgment? A. I judge I was from seven-eighths of a mile to a mile distant—seven-eights we will say. My judgment may not be very good in regard to distances.

Q. When the Victory was heading directly for you could you tell as to what speed she was making? A. I could not, sir.

Q. So you don't know what speed the Victory was making? A. No, sir, I do not.

(580) Q. In fact, you could not tell whether she was moving ahead or astern? A. Yes, sir, could tell she was moving ahead, but not at what speed.

RE-DIRECT EXAMINATION.

By Mr. SHARP:

Q. You have stated that when you were in the boat stationary in the river off buoy No. 9, that the Victory was then heading for the broadside of your little boat? A. Or nearly so; yes, sir.

Q. And as you supposed, the Victory was then heading about southwest? A. Yes, sir.

Q. But you don't know? A. I don't know; but to the best of my judgment.

Q You took no bearings? A. No, sir.

Q. And at that time how was your boat heading? A. About S. S. E., sir; I was on a line between my vessel and buoy No. 9 and Lambert's Point.

Q. You have been asked many questions as to the distance between buoys, and of your vessel from a buoy and of other vessels from buoys. Did you give your testimony on that point as a matter of judgment or estimate after the lapse of time that has passed? A. From recollection of what it was at the time, from the best of my judgment.

Q. According to your judgment now? A. Yes, sir.

Q. It is a matter of judgment with you now? A. It is, in regard to distances.

(581) Q. Now especially referring to distances and no more, do you recollect these were the distances, or think they were? A. I think they were the distances.

Q. But you don't know? A. I don't know; wouldn't swear to that.

Q. You stated just now that your judgment wasn't very correct as to distances? A. After the lapse of time; of course I didn't put down anything.

Q. You are not able, then, to state with accuracy what those distances were? A. No, sir, not correctly; to the best of my judgment, I said.

Q. You stated as a matter of judgment that the channel of the river was about 3,000 feet wide? A. Yes, sir.

Q. What channel did you refer to then? A. The main channel abreast of buoy 7.

Q. Is that your idea about it? A. That is my idea; yes, sir.

Q. And at that time you say the Victory was close upon the east side of that channel? A. Yes, sir.

Q. Could you see buoy 7? A. Yes, sir.

Q. Is that on the east side of the channel? A. Yes, sir; on a little elbow that makes out there.

Q. Near buoy No. 7? A. Below buoy 7.

Q. Was the Victory on the east side of the channel as indicated by buoy 7? A. I think the Victory was on a line from me to the east of the buoy; you see she could be on a line to the east of the buoy and still be afloat; there is a point there, you know.

Q. She was then close upon the buoy line? A. Yes, sir, very near that.

(582) Q. You have stated that the master of the Commodore took the Storm King from Lambert's Point pier over to the west side of the channel; are you positive of that? A. No, sir; I never stated that.

Q. State what you did say? A. I stated he took me from anchor; I was at anchor there between the two piers.

Q. And carried you where? A. Over to the west side of the channel to anchor.

Q. You know you were on the west side where he moved you? A. Yes, sir.

Q. And you have stated swinging distance from the bank? A. Yes, sir.

Q. And you had how much chain out? A. About 15 fathoms, to the best of my judgment; never pay out more there.

Q. How much rope? A. No rope; all chain.

Q. And was that swinging distance? A. No, sir; I said I was about 40 to 50 fathoms; I had room to pay out about 40 or 50 fathoms, provided I tailed right to the bank, before the vessel touched up to the bank. We have to make allowance for that in anchoring.

Q. And you stated the Plymothian came over to the western side where you were? A. On the western half of the channel.

Q. Not as far over as you were? A. Not hardly, because she was on my starboard bow.

Q. Close upon your starboard bow? A. No, sir; quite a distance ahead.

Q. Going down? A. Yes, sir.

Q. You mean to the north? A. Yes, sir.

Q. Was she well over on the west side of the channel? (583) A. She was in the west half of the channel.

Q. And from that point you saw her move across the channel over to the eastern half? A. I did, sir.

Q. Is there any doubt in your mind that you did see her move over from the western half of that channel across to buoy 7? A. No, sir.

Q. Did you see the English steamer Princess at anchor anywhere about you? A. I did.

Q. Where was she? A. Anchored this way of me—I mean south of my vessel.

Q. Was she nearer the bank or nearer the mid-channel? A. Nearer mid-channel than my vessel, sir, because they allow those vessels to lay in the channel or anywheres they have mind to, and don't allow us.

Q. What is the draft of your vessel? A. 21 ft. 6, loaded.

Q. And you were half loaded? A. About half loaded, yes, sir.

Q. You were anchored in the western half of the ship channel? A. Yes, sir; well over.

Q. By that do you mean much nearer to the western bank than you were to Lambert's Point pier? A. I mean nearer to the western bank than I was to the middle of the channel.

Q. Much nearer to the western bank of the ship channel than you were to the middle of the same channel? A. Exactly; that's what I mean.

Q. How was the Plymothian, was she nearer to the mid-channel or nearer to the western bank of that mid-channel? A. Mr. Sharp, you have mixed that so I don't understand you.

Q. Was the Plymothian nearer to the middle of the ship (584) channel or the western bank? A. Nearer mid-chan-

nel than she was the western bank. She was in the western half of the channel; she ought to have kept there and she would have been all right, and everybody else, and I wouldn't have been here to-day.

Q. How should she have gone from there?

Question objected to and withdrawn.

Q. Was she near to the middle line of the ship channel when she was in the western half of it? A. To the best of my judgment, yes, sir.

Q. How far from the middle line was she? A. Impossible for me to tell, but very near mid-channel when on the western half.

Q. In your judgment was she 100 feet from the western line? A. Just about that, to the best of my judgment.

Q. You say you looked down the ship channel and saw no obstruction to her going down the western side of the channel? A. Nothing whatever.

Q. You saw her move down part of the western side? A. Yes, sir.

Q. And after that cross over to the eastern side? A. Yes, sir.

Q. That movement was right across the channel that you saw? A. Or nearly so.

Q. Obliquely across? A. Not exactly across; couldn't get her exactly across, but a little slanting you know; straight across would take her a long time; got to take a long time before the rudder would heave her straight across. She was coming across so that I made the remark that her steering gear had given out.

Q. So she moved obliquely across from the western side to buoy 7? A. Yes, sir.

(585) Q. And you saw that? A. I saw that.

Q. Did you see the Victory at any time leave the eastern side of the channel? A. No, sir.

Q. Did she leave it? A. No, sir, not until she went to backing.

Q. Could the collision have occurred if the Plymothian had kept on the western side of the channel, without crossing over to the eastern side? A. Never could have occurred.

Q. Did you see the Victory commit any fault of navigation?

Question objected to.

A. Nothing whatever.

Q. If I understand you right, you say that your vessel was anchored about 100 fathoms, in your judgment, from the red buoy on the west side of the channel? A. Yes, sir.

Q. And you have stated that the red buoy bore, to the best of your judgment, west from you, or west northwest; do you know how it bore? A. I do not.

Q. You speak as a matter of judgment or knowledge? A. A matter of judgment, sir. If I have said I was anchored on a line from this red buoy to No. 9 buoy—that I was north of the line, I must have made a mistake.

Q. You didn't say a line from this buoys. He asked you if there was a line drawn across the river, how far you were below that line and you said some 300 or 400 fathoms you thought; now what is your answer; how far were you to the north of a line from Lambert's Point across the river—I mean buoy No. 9? A. I guess that answer will do.

Q. You think you were 300 or 400 fathoms to the north (586) of a line stretched straight across the river from buoy 9 to the western bank? A. Yes, sir.

Q. But that you are unable to tell the bearing of the red buoy from where you were anchored, except as a matter of judgment? A. Yes, sir.

By Mr. FLOYD HUGHES:

Q. But it was inside of you, and you think about west? A. Yes, sir. I think it was somewhere in the neighborhood of west; it is impossible for me to tell; if I said W. N. W. I mean W. S. W.

Q. But the red buoy was on the west bank, and you were about off from the buoy in the river, and about east of the buoy you think? A. Well, somewhere about that; but this Merrimac buoy sets in a little from the western bank.

Q. You were about directly out from the red buoy towards the mid-channel in your judgment, were you not? A. Yes, sir.

By Mr. SHARP:

Q. Suppose your vessel from the point where it was anchored by the Commodore, had tailed immediately to the west, and that in so tailing she would have struck upon the western bank, would that point have been above or below the red buoy? A. I think it would have been about on a line with the red buoy; that is, square with the channel, you know. That is what I think, but you see the vessel swinging up river and down river at so short a distance from the buoy alters the bearings of the buoy a great deal.

Q. But if it took from 40 to 50 fathoms of chain to keep clear of the western bank, how could the buoy be 100 (587) fathoms to the west of you? A. Because the buoy sets in from the bank.

Q. Sets in from the bank? A. Yes, sir.

Q. How far from the bank? A. I should judge 50 fathoms; it is not on the bank. I have dragged bottom right alongside that buoy and didn't in the channel.

Q. The channel then is not up to the buoy? A. The buoy is not up to the channel.

Q. It is some 45 or 50 fathoms? A. Outside the channel.

Q. The channel is some 45 or 50 fathoms outside of the buoy? A. Ain't it on a wreck? I should say so—I think so. I have been there and dragged bottom with my vessel light.

Q. You think the buoy is on a wreck? A. I think it is on something; it is called the Merrimac buoy.

Q. Were you any further from the western side, or bank, of the ship channel than the length of the chain you mention would indicate? A. I said I was anchored, and had out about 15 fathoms of chain to hold the vessel, and had room to pay out 45 to 50 in all, so that the stern would swing clear of the bank.

Q. And that would indicate the exact distance you were from the bank of the channel? A. Yes, sir. But you see my vessel would draw 21 feet 6; I have got to make a big allowance, and a light-draft vessel takes more chain to reach the bank.

By Mr. SHARP:

The bank is 25 feet depth of water at low tide in that channel.

TESTIMONY IN OPEN COURT APRIL 20TH AND 21ST, 1894.

(588)

Captain D. W. PRATT, a witness on behalf of the Victory, sworn.

Examined by Mr. SHARP:

Q. Give your name, age, and occupation? A. D. W. Pratt; 41; at the time this collision happened I was master of a steamer.

Q. What steamer? A. The "Wanderer."

Q. Your residence? A. Norfolk.

Q. You say that at the time the collision happened between the Victory and Plymothian, which occurred on the 12th of November, 1891, you were master of the steamer "Wanderer"? A. Yes, sir.

Q. In this harbor? A. Yes, sir.

Q. You saw that collision? A. I did; yes, sir.

Q. If so, describe it? A. We were lying within 50 or 75 feet of the Merrimac buoy, off Lambert's Point, waiting for the Victory to come up. We had some mail for her, and in the vicinity of 4 o'clock, after the Victory had shown herself in sight in Hampton Roads, the Plymothian came out from Lambert's Point and came diagonally across the channel until she came within, I should say, 200 feet of this Merrimac buoy, and, of course, she was turning gradually all the (589) time, and finally straightened out and went, I should say, three or four hundred feet down the channel on a north-northeast course, somewhere in that vicinity, and finally change her course again two or three points, which would make her further to the east. The whistles I can't remember, it has been so long ago, and I have never given it any thought since. I remember hearing the Victory blow two whistles, and I do remember hearing the Plymothian blow one, but at what intervals I do not remember. However, when they came very close to No. 9 buoy, just on the east shore, they came together. She struck the Plymothian, I believe, somewhere in the vicinity of the bridge, as near as I remember. I know we steamed around and looked at the hole that evening. It was after dark, though.

Q. You say when you were lying off the Merrimac buoy, which is a red buoy on the western side, you saw the Plymothian come out from Lambert's Point and cross the channel diagonally? A. Yes, sir.

Q. And pass how near? A. As well as I remember, she came within a couple of hundred feet of that buoy.

Q. And then she headed a short distance down the stream. A. After she straightened out; yes, sir.

Q. On which side? A. Pretty well on the western shore, I should say, and went two or three hundred feet, or two or three hundred yards perhaps.

Q. Down the western line of the channel? A. Yes, sir.

Q. What did you next see? A. She changed her course after she went that two or three hundred yards, I should (590) say, two or three points, which would bring her N. E. by E., and stayed on that course until she got over near together.

Q. What course did she next change to? A. Hauled further over to eastward.

Q. How was she heading at the time of collision? A. I should say very close to east, or east by south.

Q. Heading east at the time of collision? A. Yes, sir.

Q. You saw her, then, cross from the western side of the channel over to the eastern? A. Yes, sir.

Q. You didn't look at the compass to observe the course? A. No, sir.

Q. But she first went down the western side of the channel three or four hundred feet? A. Yes, sir.

Q. And then changed her course? A. I should say perhaps two or three points.

Q. And then went diagonally across the channel? A. Yes, sir.

Q. And then when she got near the Victory she changed her course more to the east? A. Yes, sir.

Q. And then the collision occurred? A. Yes, sir.

Q. That collision occurred at what buoy? A. I believe it is number 9.

Q. That is at Lambert's Point? A. Number 7—that's it. It has been so long since I have been down the harbor.

Q. Was it the buoy below Lambert's Point? A. Yes, sir; the second below. The first is a black buoy very close to the breakwater.

Q. When the Plymothian was moving obliquely across the channel from the western side to the scene of the collision on the eastern side, did she appear to you to check her (591) speed in going across up to the collision? A. No, sir; I should say she went straight across. Of course we were stern to her, and it is very difficult to judge the speed.

Q. Did you see her? A. Yes, sir; looking at her at the time.

Q. Did she appear to you to be checking her speed? A. No, sir; I never gave it any thought; perhaps wouldn't have noticed it if she did, but I should say she did not.

Q. You say at this moment of time you can't recollect what whistles were exchanged? A. No, sir; it would be impossible for me to recollect, because I never expected to hear from this thing again.

Q. And you can't fix the whistles? A. No, sir.

Q. When you saw the Victory coming up which side of the channel was she on? A. Very close on the east side all the way up.

Q. How far off? A. As well as I could judge way down, she was on the eastern shore, and after leaving Craney Island she was well over. I should say anywhere from 30 to 40 feet of the bank.

Q. You mean the buoy line? A. Yes, sir.

Q. And you saw her come up? A. Yes, sir, because I was watching all the time for that ship.

Q. Was she at any time in the middle of the channel after leaving Craney Island? A. No, sir; came up a very straight course.

(592) Q. Was she at any time on the western side of the channel after leaving Craney Island? A. No, sir.

Q. Did you see her before or after she passed Craney

Island on the middle or western side of the channel? A. It would be a pretty hard thing to remember so far. I could tell if I had been watching particularly, but to remember back that far would be pretty hard to do.

Q. But you remember you observed her from Craney Island to the scene of the collision coming up on the eastern side of channel, not at any time in the mid-channel, not at any time on the western side of the channel, but pursuing a straight course up the eastern line of the channel? A. Yes, sir, that's right.

Q. Did she keep a uniform distance from the buoy line? A. Yes, sir, steering a straight course apparently from Craney Island up to that buoy.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES.

Q. You say you were in command of the tug Wanderer? A. I was at that time.

Q. And had business with the Victory and was watching for her to come up? A. We had some letters for her, yes.

Q. What kind of a tug is the Wanderer? A. We were at that time carrying stores for Mr. Baum.

Q. She is the one that is in the C. & O. dock now, isn't she? A. No, sir.

Q. There is one there? A. I don't know; if there is I don't know her.

(593) Q. Were you just lying over near the Merrimac buoy? A. Yes, sir, just floating with the tide.

Q. What other vessels were near you over there? A. Well, I don't remember now. I think there was another steamship lying off there, if I remember right, but it has been so long, you know, and I didn't expect to hear from this thing again; I just happened back here and happened right in it.

Q. Were you to the north or south of that buoy? A. I was lying perhaps 15 or 20 or 30 feet inside of it.

Q. To the westward of it? A. Yes, sir; we were a little up towards Norfolk probably—I guess within about 100 feet of it, southwest.

Q. You say you don't remember any vessels being in the vicinity? A. I don't remember, no, sir. It would be impossible for me to remember back.

Q. Yet you do remember the course of these vessels? A. An object of that kind a person couldn't help remembering very well

Q. You testified about hearing three whistles you remembered distinctly? A. I don't remember the three whistles at all.

Q. You said you remembered hearing two whistles of the Victory and one of the Plymothian? A. Yes, sir, I remember those, but what time I couldn't remember to save my life.

Q. You remember hearing those three blasts from those two steamers at some time, but you can't identify the time? A. A man hears a ship's whistle but don't always pay attention at all—has no connection with it.

Q. Do you remember any other vessels out in the river (594) at that time between Craney Island and Lambert's Point? A. I think there were some schooners further down the river.

Q. You said that when the Victory passed the lighthouse she was then on the eastern side of the channel? A. Yes, sir.

Q. How close over to the eastern side? A. I should say within 40 to 100 feet of the eastern line of buoys.

Q. And continued that close to the eastern line of the channel? A. It would be pretty hard to get at the correct distance; we were well on the western side, but she was well over on the eastern shore.

Q. And you are certain she kept a straight course from that time up to the buoy, hugging the eastern bank? A. As near as a ship could steer; yes, sir, came straight along up. Some ships would yaw a little, but she kept an ordinary straight course up the river.

Q. And until she came into collision with the Plymothian? A. Yes, sir. Of course she might have changed her position a trifle when she came within 75, 100 or 200 feet of the other ship and we couldn't see it because we were behind her.

Q. But before that time you had seen her and she hadn't changed her course? A. She kept as straight a course as a ship could. All ships will yaw about some, especially a light ship

Q. Could you tell the speed of the Victory? A. I should think the Victory was coming up the harbor at from 10 to 12 miles an hour. I don't know the speed of these ships but that's about the average speed. She was coming right along a pretty good jog.

(595) Q. At the time you saw the Plymothian near the buoy, where do you judge the Victory to have been? A. Over near the red buoy.

Q. The red buoy. You say you saw her. When the Plymothian was within 200 feet of the red buoy, where in respect to Craney Island was the Victory? A. I should say a mile or a mile and a half below Craney Island—perhaps a mile.

Q. That is, to the north of Craney Island? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. You say the Plymothian came across from the coal pier diagonally across the channel? A. Yes, sir.

Q. Can you tell me how the Plymothian was heading when close to buoy 22? A. Well, I should say she was heading about north, the nearest to it, probably—hadn't straightened by perhaps 2 points.

Q. And you mean to say she would have to straighten up two points in order to strike the channel course? A. Very near that, yes, sir. I am not able to tell the course down there now; I am only giving this according to my memory.

Q. I will give it in a little different way. At the time she was nearest to buoy 22 how far away was she from the channel course, her head? A. It would be called a channel course if she was anywhere inside the red buoy, if she was straightened up.

Q. At the time she was nearest the red buoy she wasn't straightened up? A. Not quite.

Q. About two points of being straightened up? A. She (596) was swinging all the time after she left Lambert's Point, I suppose. She swung very slow, I remember that distinctly, that she swung very slow in straightening up.

Q. She was on a port helm all the time crossing the channel? A. I should say she was.

Q. And when she got to this point, 100 or 200 feet of buoy 22, she wanted one or two points of having straightened on her course down channel? A. Yes, sir; that is as near as I can remember.

Q. How far was she to the north of buoy 22 before she was straightened in the channel? A. Oh! she might have been 100 feet, 150 feet, or 200; perhaps her length.

Q. How soon afterward did you notice any change in her course? A. I should say she went anywheres from 2 to 400 yards after she straightened up.

Q. In your direct examination you first stated she ran about 3 or 400 feet, then again you stated 2 or 300 feet, and later you said she ran 2 or 300 yards? A. It was very difficult to say. The ship would be end on, and it would be pretty hard to judge her.

Q. You were in a position where it would be pretty hard to tell how far she went? A. She couldn't have gone over 3 or 400 yards at the outside.

Q. And might not have gone 2 or 300 feet? A. Yes, sir; more than that. A ship will go her own length in a very short time, even going slow.

Q. Do you think she ran her length? A. It would be very hard to tell, the speed she was going.

(597) Q. You think she ran one of her own lengths after she straightened before she commenced going across the channel? A. Yes, sir; I think she would have run three times her length. I should imagine she was going 5 or 6 miles an hour after she straightened out.

Q. And that she may have run three times her own length before she left the west side of the channel? A. I should think so. Yes, sir.

Q. You had no particular object in measuring that distance? A. No, sir; that is only my recollection now. I may be a long way out.

Q. It may have been very much less or very much more? A. Only my judgment. As I said before, I never expected to hear from this again; never thought of it; couldn't remember the ship's name until yesterday.

Q. It has been out of your mind, then, for two years? A. Yes, sir; I haven't been in the business since that time. I left here shortly afterwards.

Q. You will not say the Victory was going 10 or 12 miles an hour when she struck the Plymothian? A. No, sir; if she had she would have gone right through her.

Q. Do you think she had reversed before the collision? A. Of course. I should think anybody on a ship's bridge would reverse the engines before they got that distance. Their ship, I should think, slowed down before it got to the Plymothian.

Q. By reversing? A. Yes, sir; if she hadn't, she ought to. Of course, the Victory was behind the Plymothian at (598) that time and we couldn't tell, but we expected they would come together. After they got a certain distance apart I remarked to a party on board with me that I didn't see what would keep them from coming together. Up to that time I hadn't thought about it.

By the COURT:

Q. What time of the day was it? A. In the vicinity of 4 o'clock.

Q. A clear day? A. Yes, sir.

By Mr. MYNDERSE:

Q. When you made this remark how far apart were the vessels? A. They wasn't over three or four hundred feet at that time.

Q. You hadn't noticed any change in the speed of either at that time? A. Yes, sir; the Victory had slowed down. I could almost swear to it, and I think the Plymothian had stopped her engines at that time; we didn't seem to see the

water. I remember more about that part of it than any other because it was so forcible.

Mr. M. C. Wood, a witness for the Victory, sworn.

Examined by Mr. Hughes:

Q. What is your business? A. Boiler maker.

Q. With what firm? A. Godwin & Company—Virginia Iron Works; foreman of the boiler department.

Q. Do you remember examining the steamer Victory about three years ago? A. Yes, sir.

Q. Please look at this photograph No. 1, and tell me whether that represents her injury as it was before you put (599) any patches on on the starboard side? A. Yes, sir; I think that is something the look of the bow of the Victory.

Q. Is that a good representation of it? A. Yes, sir.

The photograph referred to is herewith filed marked "Photo. 1."

Q. Now look at photograph No. 2 and say whether that is a good representation of the view of the Victory as she was before you put any patches on, looking at her head on? A. Yes, sir; as well as my recollection serves me I think that is very much like her.

The photograph referred to is herewith filed, marked "Photo. 2."

Q. Now, please look at photograph No. 3 and say whether that is a good representation of the injuries to the port bow of the steamer as you saw them before you put a patch on? A. Yes, sir.

Q. Describe that injury to the Victory as you saw it. Where was the hole? A. The hole was in the starboard side near the bow—the starboard bow.

Q. The hole was in the starboard side near the bow? A. Yes, sir.

Q. And did you find any foreign substance that apparently was not a part of the Victory in there? A. Yes, sir, a large piece of iron in there.

Q. Where was that? A. Inside, it apparently went through that hole in the starboard bow.

Q. Lodged on the starboard bow? A. No, sir; it apparently went through the hole.

Q. And lodged in the port bow? A. It was jammed (600) against the port side inside.

Q. Well, as I understand, there was a hole on the starboard stem, and this piece of iron was lodged up against the port stem? A. Yes, sir.

Q. Was the port stem at the point this iron struck it bulged outwards? A. Yes, sir.

Q. Then your testimony is that when the Victory came to your yard there was a hole in her starboard stem and a piece of iron that had gone through that hole and lodged up against the port stem? A. Yes, sir; jammed up in there.

Q. Causing the port stem to bulge out? A. Yes, sir.

Q. What sort of repairs did you put on? A. Mere temporary; bolted those sheets on.

Q. And these photographs are good representations of the injuries as you remember them? A. Yes, sir; about the shape of the sheets I put on there. They show the holes that I had to put patches on

Q. They were taken off—your patches were removed? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. Did I understand you to say the port stem was bulged out? A. The port bow was bulged out and cracked.

Q. The port bow? A. The port side at the stem.

Q. The stem, as I understand it, is the timber that runs down with the plates attached to it? A. The sheets that (601) were connected to the stem was cracked.

Q. And it was bulged on the port side? A. Yes, sir.

Q. What was the condition of the stem itself? A. Well, as well as I remember, I don't think the stem was hurt much, but the iron was broke right alongside the stem.

Q. It wasn't twisted out of plumb was it? A. I couldn't remember that.

Q. The only thing that you remember about it was these holes appeared on the starboard bow and a piece of iron had seemingly entered on the starboard bow and jammed over on the port bow, causing the sheets to bulge a little? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. Do you know the thickness of these plates on the bow? A. Not exactly. I think about five-sixteenths; something like that—probably three-eighths.

Mr. LEONARD C. W. PAGE, a witness for the Victory, sworn:

Examined by Mr. SHARP:

Q. State your name, age, residence and occupation? A. L. C. W. Page, 38, Portsmouth, real estate agent.

Q. On the 12th of November, 1891, which was the day of the collision between the Victory and Plymothian, where were you? A. I was on the Lambert's Point Light-house.

Q. Who was with you at the time? A. Standing alongside the light-house keeper, Mr. Martin.

Q. Did you see the Plymothian leave her pier? A. Yes, sir.

(602) Q. If so, describe it? A. She left the pier—I helped cast off the lines.

Q. She left the North coal pier at Lambert's Point at what time? A. Some time in the afternoon; I don't remember the time, sir.

Q. Describe her leaving? A. She left there and crossed right across the river; there was another steam vessel lying at anchor, and she passed close to her, and then went down, the western side of the river.

Q. Go on, and describe anything further? A. When she got down, just before meeting the incoming steamship, which I was waiting for, she seemed suddenly to cross right across the course of the incoming steamer. I imagined her steering gear had broken down by the suddenness with which she crossed the incoming steamer.

Q. I understand you to say she left the coal pier and went to the western side of the channel? A. Yes, sir.

Q. And you say towards the western side was lying another steamer. What was that steamer? A. The "Princess".

Q. What nation? A. British.

Q. She passed by the Princess and went over to the western side of the channel? A. Didn't pass her, came close to her. She was lying rather up-stream anchored, and then the Plymothian turned down the channel.

Q. Having gone some distance down the channel she crossed to the east side of the channel? A. Yes, sir.

Q. And then the collision occurred? Yes, sir.

(603) Q. You saw that movement from Lambert's Point to the west side of the channel? Yes, sir.

Q. Saw the movement from there down the west side of the channel? A. Yes, sir.

Q. And then saw her cross over to the east side and then saw the collision occur? A. Yes, sir, suddenly seemed to veer over towards the east side as if something had gone wrong with her.

Q. Then you say she crossed twice across the channel, once to the west side and then back to the east side? A. Yes, sir,

Q. When she crossed to the east side did you notice any checking of the speed? A. No, sir, I did not.

Q. She seemed to go the same way across. Do you recollect anything about the signals that were exchanged at this time? A. No, sir, except that I heard the incoming steamer blow two blasts, whether he had gotten one blast or not I do not know, I was paying no attention to the other. I heard two blasts from the incoming ship.

Q. Did you look down the channel and see the Victory coming up? A. Yes, sir, watching for her.

Q. Which side? A. Coming up on the east side of the channel.

Q. Near to the buoy line or not? A. I don't know what you call the buoy line, but she appeared to be hugging the shore very close from what I heard before the collision occurred.

Q. She was coming up on the east side? A. Yes, sir.

Q. How was she apparently heading, for what buoy? (604) A. She appeared to me to be heading as straight to where we were, that is, the end of the light-house.

Q. Did she mainiain that course consistently from Craney Island up to the collision? A. Yes, sir.

Q. You didn't see any change? A. No change at all.

Q. Did you see her at any time in mid-channel? A. No, sir.

Q. You had your eye upon her? A. Yes, sir.

Q. She kept upon the eastern side? A. Yes, sir.

Q. And the course was apparently unchanged from Craney Island up to the scene of the collision? A. Yes, sir.

Examined by Mr. HUGHES:

Q. I suppose at or just before the collision you could not see the Victory for the Plymothian? A. No, sir, I couldn't see anything but her spars, that is all. The Victory was a light vessel, and was considerably out of the water.

Q. So that just before the collision the Plymothian came between you and the Victory and prevented your seeing how she was moving? A. Certainly, sir; I couldn't see see that.

CROSS-EXAMINATION.

by Mr. FLOYD HUGHES:

Q. What were you watching for her for? A. I was then running for ship stores and was waiting for the ship to try and supply her.

Q. You knew Captain Elcoate very well, didn't you? A. Yes, sir.

Q. Known him a number of years? A. Quite a number.

(605) Q. And you were waiting to sell him stores when he arrived? A. Yes, sir.

Q. That was your business at Lambert's Point? A. That was my business.

Q. When you first noticed the Victory where was she? A. She must have been just above Craney Island light when I first saw her.

Q. Where was the Plymothian then? A. Just left the pier then, I guess.

Q. She had just left the pier and the Victory was below Craney Island; how far below? A. I couldn't tell that, sir; my attention was called to the Victory by Captain Martin, of the lighthouse.

Q. You do remember that the Plymothian had left the pier before the Victory got to Craney Island light. A. I couldn't swear to that, but it is my opinion she had left the pier before she got there.

Q. You, then, as I understand it, paid no attention to the Plymothian, but watched the Victory? A. I watched the Victory from the time I first saw her until she came into collision with the Plymothian.

Q. And didn't pay any attention to the Plymothian from the time she left the pier until you saw her sheer over, as you say, from the western side towards the Victory? A. After she got across the channel I didn't pay much attention to her at all.

Q. You say you don't know much about the buoy lines? A. No, sir.

Q. You are not a navigator? A. No, sir.

(606) Q. You don't know buoy No. 9 or buoy No. 7 or the Merrimac buoy? A. No, sir.

Q. And you only judged, you say, that the Victory was on the east side of the channel from what you had heard before you saw the Victory. That was your statement, was it not? A. My statement is this: that how I knew the Victory was on the east side of the channel was that I was informed before the collision took place that it was a wonder she didn't go aground, she was hugging the eastern shore so close.

Q. But you don't state that from your own knowledge? A. No, sir.

Q. You don't know that channel and can't swear she was on the eastern side? A. I don't know the channel; I can only say as regards the river.

Q. You can only say as regards the river judging from shore to shore. You would say, then, that the Victory was on the east side of the channel at that point? A. Yes, sir.

Q. You say you didn't notice the whistles of the Plymothian one way or the other? A. No, sir, I did not.

Q. But you do remember having heard two whistles from the Victory? A. Yes, sir.

Q. Those were all the whistles you heard from the Victory, I suppose? A. Those were all, sir.

Q. You had your eyes constantly on the Victory from time she passed Craney Island up to the time she was in collision with the Plymothian and the Plymothian shut her out? A. I won't say that positively, sir.

Q. I understood you to say that? A. I wouldn't swear (607) to that; I was watching the ship but my attention might have been distracted a moment or two or three moments.

Q. You don't know anything that obstructed your view of the Victory up to the time the Plymothion shut her out? A. Nothing at all, sir.

Q. You can't judge of the speed of the Victory, can you? A. No, sir.

Q. How about the Plymothian? A. I don't know anything about that, sir, what speed she was going at.

Q. You are not a navigator and can't estimate the speed, I suppose? A. No, sir.

RE-DIRECT-EXAMINATION.

By Mr. SHARP:

Q. You were on Lambert's Point pier, which is on the east side of the river? A. Yes, sir.

Q. Is there a buoy near there? A. I don't know whether there is or not, there are so many buoys around there.

Q. You were on the Lambert's Point pier, and saw the Plymothian go across the river to the west side? A. Yes, sir.

Q. And saw her go down the west side? A. Yes, sir.

Q. And then saw her cross to the east side and saw the collision occur? A. Yes, sir.

RE-CROSS-EXAMINATION.

By Mr. HUGHES:

(608) How close did the Plymothian come to the Princess? A. That I couldn't judge.

Q. You couldn't approximate it? A. No, sir.

Q. You used the expression "near"? A. Well, in looking across the water it might look very near and be a considerable distance from her.

Q. You can't estimate in feet what you mean by "near"? A. No, sir.

Q. It may have been several hundred yards or it may have been several yards? A. Not many hundred yards, I imagine. It may have been several feet or several yards, but not several hundred yards.

Examined by Mr. MYNDERSE:

Q. Can you indicate where the Princess was lying? A. Yes, sir, I think I could do that.

Q. By words can you describe it? A. I should imagine the Princess was lying rather up the river from the pier than in a line with it and across the river.

Q. And near the western side of the channel? A. Yes, sir.

RE-RE-DIRECT-EXAMINATION.

By Mr. HUGHES:

Q. I understood you to say as you watched the Victory she seemed to be heading almost exactly for the place where you were standing? A. Yes, sir.

(609) CAPTAIN JONATHAN MARTIN, on behalf of the Victory, sworn:

Examined by Mr. SHARP:

Q. State your name, age, residence, and occupation? A. Jonathan Martin; 51 last January; Portsmouth; I handle lines for the steamships at Lambert's Point.

Q. What was your occupation on the 12th of November, 1891, which was the day of the collision between the Victory and Plymothian? A. I was light-house keeper at the time.

Q. At what place? A. Lambert's Point.

Q. Did you see that collision? A. Yes, sir.

Q. Who was with you at the time? A. Mr. Page.

Q. L. C. W. Page? A. Leonard Page.

Q. About what time of the day was it? A. Now I don't remember the hour.

Q. Afternoon or morning? A. I don't even remember that. I know it was a beautiful day. We were looking at the ship.

Q. Did you see the Plymothian leave the pier? A. Yes, sir; I turned the lines loose.

Q. Which pier did she leave? A. The north side of the north pier.

Q. Now did you notice her movement when she went out from the pier and where she went; if so, tell? A. She went right straight out around the black buoy, because they have to go around the black buoy to strike the channel,

and in making the curve of course she went over to the western side of the channel.

Q. Went over towards the west side of the channel? A. Yes, sir, as she went down she kept down the channel until (610) *until* she got near the other black buoy, and then she curved and came right across the channel to the east side.

Q. She left the pier on the north side of the north pier and went across the channel towards the west side of the channel? A. Yes, sir.

Q. Then, when she got there, she went down the west side? A. Down the west side quite a distance.

Q. Do you know the Merrimac buoy? A. Yes, sir.

Q. How did she pass in respect to the Merrimac buoy? A. Passed to the east of it.

Q. And went below it? A. Yes, sir. Well, I don't know whether below it or not; she was in that neighborhood.

Q. Then you saw her pass over to the eastern side? A. Yes, sir.

Q. And then the collision occurred? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. Saw her move from the pier? A. Yes, sir.

Q. Saw her go out towards the western side of the channel? A. Yes, sir.

Q. Saw her move down the western side? A. Yes, sir.

Q. Saw her cross again to the eastern side and then the collision occurred? A. Yes, sir.

Q. On the eastern side? A. Yes, sir.

Q. You have been there a long time and know the buoys there. The black buoys are on which side? A. The black buoys are on the eastern side of the channel.

Q. What is the number of that buoy at Lambert's Point? A. I don't remember. In altering the buoys they alter (611) their numbers right often.

Q. The collision didn't occur at that buoy: at what buoy did it occur? A. Midway between the two lighthouses.

Q. Was it the next buoy below Lambert's Point? A. Yes, sir.

Q. And that is on the eastern side of the channel? A. Yes, sir.

Q. And the buoy she moved over towards, was it a red or black buoy? A. A black buoy.

Q. On the western side? A. No, sir; she was on the western side and moved over towards the eastern side.

Q. I am speaking of the buoy on the western side: what is the color of that? A. A red buoy.

Q. Is that called the Merrimac buoy? A. Yes, sir.

Q. Then she moved over towards the Merrimac buoy from Lambert's Point? A. Yes, sir.

Q. And then moved down by the Merrimac buoy and crossed over again to the buoy on the eastern side, where the collision occurred? A. Yes, sir.

Q. Do you remember the whistles that were blown at that time? A. No, sir, I do not.

Q. You saw the Victory come up? A. Yes, sir.

Q. Put your eye upon her and watched her? A Yes, sir.

Q. Which side did she come up? A. The eastern side of the channel.

Q. How was she heading? A. Apparently as straight for the end of the pier as she could.

Q. Heading for Lambert's Point light? A. Yes, sir.

(612) Q. All the way from Craney Island up? A. Not from Craney Island up; from the light-ship up to the collision.

Q. When off the light-ship and up to the point of the collision was she heading consistently towards the Lambert's Point light-house? A. Yes, sir.

Q. Did you see her at any time in the middle of the channel? A. No, sir.

Q. Did you see her at any time leave that side and go to the middle or western side? A. No, sir.

Q. Close upon the eastern side or not? A. Close upon the eastern side.

Q. You know the buoys and can tell the channel line, and you know she was close on the buoy line on the eastern side of the channel? A. Yes, sir, all the way from the light-ship up.

Q. That you saw? A. Yes, sir, I was watching her all the way from there up. We were expecting the ship and was watching out for her.

Q. Then you saw the Plymothian cross the channel twice, first from the pier over to the red buoy? A. Of course when she went over she didn't go over clear to the edge of the channel, near the centre of the channel.

Q. Near the red buoy? A. Yes, sir.

Q And then went a short distance down the western side of the channel and then crossed over to the east side and then the collision occurred? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

(613) Q. You say she went over to the center of the chan-

nel at least? A. Yes, sir. Going to the west he went fully to the centre of the channel if not across it.

Q. Didn't go over to the western edge of the channel? A. Couldn't go over to the western edge and couldn't go down the eastern edge with a loaded ship; if you do the suction will draw and put the ship ashore—you have got to go straight down the channel.

Q. And the middle of the channel? A. Yes, sir.

Q. And that's the way the Plymothian went? A. Yes, sir.

Q. You say you had your eye on the Victory from the time she passed the light-ship? A. Yes, sir.

Q. And she was on the eastern side of the channel? A. Yes, sir.

Q. And always had her head directed to Lambert's Point pier? A. Yes, sir.

Q. And you were watching her? A. Yes, sir.

Q. When the Plymothian left the pier and passed buoy No. 9, as she did, where was the Victory? A. The Victory was down near the light-ship at that time—between the light-ship and the light-house.

Q. And the Plymothian was at buoy No. 9? A. Yes, sir.

Q. Could you judge of the speed of the Victory? A. No, sir.

Q. You could all the time see her up to the time the vessels came together? A. Yes, sir. It was a beautiful, clear day.

Q. And there was nothing to obstruct your view, and you saw she kept to the east side of the channel? A. Yes, sir.

Q. And always headed right at the pier? A. Yes, sir.

(614) Q. A good deal has been said in this testimony about the whistles. Do you know anything about the whistles? A. No, sir, I don't know. I don't know at the present time whether there was one or five.

Q. You heard whistles from both ships? A. Yes, sir.

Q. But you don't know exactly what the whistles were, whether the Plymothian blew ten or the Victory blew ten or what? A. I am satisfied they didn't blow ten.

Q. You heard both ships blow whistles, but you don't know how many? A. I paid no attention to how many there were.

Q. You heard both of them blow their whistles distinctly? A. Yes, sir.

Q. Could you judge of the speed of the Plymothian at all? A. No, sir.

Q. She left the pier loaded? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. Are you anything of a navigator? A. No, sir.

Q. Do you know what effect a port helm has on a steamer? A. I know in a small boat, not in a large one. I know in a jolly boat

Q. Then you don't know which way a port helm will turn large vessels? A. It depends entirely on the way the steering gear is rigged.

Q. Well, you know which is the starboard side of a vessel? A. Yes, sir.

Q. In order to turn a vessel to starboard—a large vessel—do you know which helm you would give her? A. Well, throw the helm hard-a-port, I should say.

(615) Q. Do you know what helm the Plymothian would have to take in going out from the coal docks in case she wanted to go to sea? A. Well, she would port her helm, I suppose.

Q. And did she port her helm? A. I don't know about that.

Q. Well, she did go out towards the sea? A. Yes, sir.

Q. It is fair to infer, then, that she ported her helm? A. Yes, sir.

Q. You can't tell what point she commenced to port it or where she ceased to port it? A. No, sir.

Q. Do you know how far it is from the light-ship to Craney Island light? A. No, sir.

Examined by Mr. FLOYD HUGHES:

Q. How close to black buoy No. 9 did she pass when she went out from the pier? A. I suppose within 50 feet or 50 yards—I couldn't tell.

Q. Very close aboard? A. Yes, sir, it is a point to turn to go out; if she hadn't the flood tide would have cut her close to it. It has been so long I couldn't tell the distance.

RE-DIRECT-EXAMINATION.

By Mr. SHARP:

Q. Have you often heard an English steamer's whistles? A. Yes, sir.

Q. Are they generally distinct? A. Some are and some ain't.

Q. Do you recollect on that day whether the Plymothian had a clear and distinct whistle? A. No, sir; I do not.

(616) Q. Then you don't know whether she has got a clear whistle or not? A. Well, when I was down there I heard the whistle: how many I don't know.

Q. You don't know whether it was clear and distinct? A. I could hear it at Lambert's Point.

Q. You heard it when she went out? A. Yes, sir.

Q. And that's all you could hear? A. Yes, sir.

Q. In speaking of the western side of the ship channel you mean the water that is between the middle of the channel and the buoy line on the west? A. Yes, sir.

Q. Was it in the space between the buoy line and the middle of the channel that the Pylmothian went? A. Yes, sir.

Q. To the west of the middle line, and east of the buoy line? A. Yes, sir.

Q. Didn't go up to the line of buoys, but she went between the middle line of the channel and the buoys? A. Yes, sir.

Q. And kept down that western half until she crossed over? A. Yes, sir.

Q. And did the Victory keep in the eastern half coming up? A. Yes, sir.

Q. And the Plymothian kept on the western half going down until she crossed over? A. Until she crossed over.

Examined by Mr. MYNDERSE:

Q. Which vessel were you watching? A. The Victory more closely because the Victory was coming up and the Plymothian going down. It was my business to handle the lines and I was looking out for work.

(617) Q. You can't pretend to say what course the Plymothian took? A. Not the exact course. No, sir.

Q. You can't say from your observation how she was in reference to the line of mid-channel? A. No, sir, but she couldn't be very far from the line of mid-channel, because a loaded ship couldn't go down there.

Q. You have already stated you could not assume to say when she started to turn or to stop? A. No, sir.

Examined by Mr. SHARP:

Q. You have said she couldn't be far from mid-channel because a loaded ship couldn't go down close to the buoy line? A. Yes, sir.

Q. But you say she was between the middle line and the buoy line? A. Yes, sir, to the best of my judgment.

Examined by Mr. FLOYD HUGHES:

Q. But you do not undertake to state distinctly that she was west of the middle line? A. Well, I think she was a few feet to the west—may have been 50 or 100.

Q. May have been exactly, but she may have been 50 or 100 feet? A. Yes, sir.

Examined by Mr. SHARP:

Q. But you saw her cross from the east to the west and from the west to the east afterwards? A. Yes, sir.

Examined by Mr. ROBERT HUGHES:

Q. As I understand that, without talking about the ex-
(618) act lines, she went more than half way across the channel? A. Yes, sir, what I thought—the best of my judgment is she went over half way across.

Q. Did you notice any tugs around there in addition to these two steamers? A. Yes, sir.

Q. Were they whistling? A. I think so.

Q. Could you swear, if you didn't notice specially, whether the whistles came from these two steamers or the tugs? A. They were all whistling I think; the pier tugs generally tow the loaded steamers out, and when they part they generally salute.

Q. Did you notice whether any towed the Plymothan out? A. I think she was head out and didn't require any, but she may have been helped around by the Commodore.

Q. But the Commodore was there and blowing? A. Yes, sir.

Q. And you didn't pay any special attention to the whistles? A. No, sir; there might have been half a dozen whistles or might have been one.

Q. You don't know exactly where they came from? A. No, sir.

Mr. FREDERICK TWEDDLE, on behalf of the Victory, sworn:

Examined by Mr. SHARP:

Q. State your name, age, residence and occupation. A. Frederick Tweddle; 43; Lambert's Point; clerk.

Q. Clerk on the Lambert's Point pier? A. Yes, sir.

Q. Office at the end of the pier? A. It was at that time at the end of the pier on top the pier.

Q. Your office at the time of the collision between the
(619) Plymothian and the Victory, which was the 12th of November, 1891, was at the end of the pier? A. Yes, sir.

Q. Did you see the collision between these vessels on that day? A. Yes, sir.

Q. What time of the day? A. Somewheres about 4 o'clock I reckon.

Q. In the afternoon? A. Yes, sir.

Q. Were you in your office at the time? A. Yes, sir.

Q. Tell what you saw, and describe the movements of the Plymothian. A. I knew the Plymothian had gone out of the pier, because she had passed by the end of the office, and I knew the Victory was coming up, and I heard the remark passed that there was going to be a collision and I stood up and looked out of the window, and when I looked the Plymothian was coming from the western side of the channel to the eastern side of the channel, coming traight across the bows of the Victory, making a collision nevitable.

Q. The first you saw of the Plymothian she was on the western side? A. Yes, sir, coming from the western side to the eastern side, coming right across the bows of the Victory.

Q. The Victory was on which side of the channel? A. The eastern side of the channel. She appeared to be stopped or backing, I couldn't say which.

Q. And you were watching? A. Of course she was not stopped, but her engines were stopped. She was under way.

Q. She appeared to be backing her engines? A. Appeared to be. I couldn't say.

(620) Q. But you saw her on the eastern side of the channel? A. Yes, sir.

Q. Close to the buoy line on the eastern side of the channel? A. I didn't take particular notice of the buoy line. When I looked out it was immediately prior to the collision and she came right across the bows of the other vessel and the collision was inevitable.

Q. Which vessel? A. The Plymothian was crossing the bows of the Victory.

Q. Coming from the west side to the east side, on which side the Victory was moving? A. Yes, sir.

Q. The Victory was moving up the eastern side of the channel and you saw the Plymothian crossing from the west side to the east side and cross the bows of the Victory? A. Yes, sir.

Q. Have you any doubt about it? A. Not the slightest.

Q. You are familiar with the channel line? A. I can't say I am familiar with them. I have been there ever since the pier was made and have got a pretty good idea of the way they come up and go down.

Q. You have seen them go down before? A. Hundreds of times.

Q. When the tide is flood what have you seen vessels do to prevent going over to the western side? A. Let go the anchor.

Q. Is that to keep them from being carried by the flood

tide over to the western side? A. I can't say that, sir. I have seen them do it. Now, generally, a tug takes them out and straightens them up in the channel.

(621) Q. But sometimes you have seen them drop an anchor to enable them, you don't know why? A. I have frequently known them to do it.

Q. You have seen many steamers cross over to the western side from Lambert's Point pier? A. Well, so far as I could see, they wouldn't skirt around the buoy; they would generally go pretty well over.

Q. Between the middle and the buoy line? A. They wouldn't come right close around the buoy line for fear of going ashore—well over to the other side generally.

Q. That's the case with most steamers that go out that you have seen? A. Yes, sir.

Q. When they do that do they generally keep down the western side of the channel? A. I couldn't say; I don't know what the rule is, but they seem to me to go pretty well over.

CROSS-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You are in the office in which Mr. Howard was working? A. Up on top the piers; yes, sir.

Q. You don't remember the first time you met me, do you? A. No, sir; I can't say I do.

Q. Wasn't it shortly after the collision? A. I do remember meeting you then.

Q. Do you remember Mr. Page and I coming down and coming up to your office? A. Yes, sir.

Q. Do you remember a conversation that occurred? A. No, sir; I remember your asking me questions about it (622) and turning away very suddenly as if it didn't suit you.

Q. Don't you remember I asked you if you heard the whistles? A. I said I paid no attention to the whistles at all.

Q. Don't you remember I asked if you saw the collision and you said you only saw the vessels as they came together? A. I don't remember that. I said just now that it was immediately prior to the collision when I saw them, and of course it could only have been a few seconds before the collision occurred.

Q. How far was the Plymothian from the Victory when you saw her? A. Well, I really couldn't say. It seemed to me to be only a very few seconds when the shock took place.

Q. A matter of a few feet or a few yards when you noticed them? A. Probably only a few yards.

Q. And it was only upon some one hollering out that there was to be a collision that you got up? A. Yes, sir.

Q. And then you got up, and the vessels were almost in the act of coming together? A. Yes, sir, it might have been a minute or two; I could't say, the things passed so quickly.

Q. I believe you stated you didn't pay any attention to the whistles? A. No, sir.

Q. You were at work and there were a good many other whistles blowing? A. I never pay any attention to them.

Q. And you don't know anything about them on this occasion? A. No, sir.

Q. How was the Victory heading when you looked at her just before this collision? A. As I remarked, she appeared to me to be backing.

(623) Q. I am talking about heading. How was her bow heading when you looked at her? A. As far as I remember, she oppeared to be trying to get to the west a little. You see the other fellow was coming right across his bows, and he appeared to be backing, and if anything, his head appeared to be going that way.

Q. How was her head in respect to the pier. Was her head directly at the pier, or wasn't her starboard side or her port side? From the position that you were standing on the pier, did you see the Victory bows or see her starboard side or her port side? A. When I first saw her she appeared to be coming pretty near opposite where I was standing.

Q. And then you said she appeared to be going to starboard? A. When I saw her first she appeared to be heading up like. If anything, her head would be leaning over to the west, I suppose.

Q. And it was in that position that the vessels came together? A. Yes, sir.

Q. And she was heading a little to the west of Lambert's Point coal pier? A. Yes, sir.

Q. And the Plymothian came from what you judged to be the west side to the collision? A. Right across her bows—doing all she could to get out of the way.

Q. What was the angle of the collision? A. I couldn't tell you; I don't know anything about angles.

Q. You say she was heading right across her bows. Do you mean to say by that *there* there was a right angle between the vessels? A. I say that when I looked—here was the Victory coming up here, and when I looked the Plymothian was coming right across here, and the Victory ap-

(624) peared, if anything, to be stopped and to be pointing a little to the west so as to get rid of the Plymothian, which was coming across.

Q. You say that was not more than a moment before the collision? A. I couldn't say more than a minute, I say it might have been It seemed to me to be very close, but I couldn't say whether it was a minute, a second or two or three minutes. The shock seemed to come very shortly afterwards.

Q. And in that position you think that you could judge that the Victory had stopped and was backing? A. I should think I ought to be able to judge.

Q. Do you mean that her engines were stopped or that the vessel was stopped? A. I think the engines; the headway of the vessel most decidedly was not stopped.

Q. You made some statement about the custom of English vessels in leaving the pier. Is it not a fact that many of these Virginia pilots who have charge of English steamers going out object to tugs taking hold of them so they can get them out without trouble? A. I can't say; I have heard that opinion expressed very often; on the contrary, they are very glad to get them, but at that time the rule was we got paid a certain sum of money, and if we put a steamer in bow first we had to help her out, and if she was put in stern first she went out by herself. It is changed now. If there were extraordinary circumstances, it didn't seem favorable to get around, probably the pilot would call up a tug, but according to our agreement with Colonel Lamb we were not obliged to, if we put the steamer in stern first

(625) By Mr. MYNDERSE:

Q. When you looked out of the window and saw these vessels do I understand you to say that the Plymothian was right across the bows of the Victory? A. Appeared to me so, sir.

Q. So her stem had already crossed the line of the Victory's stem? A. No, I don't say right across the line, but I saw the collision was inevitable.

Q. Was the Plymothian or any part of the Plymothian between you and the Victory? A. I couldn't say.

Q. At the time of the collision the Plymothian was between you and the Victory—when they came into collision? A. Oh! yes, sir; certainly she was.

Q. But you can't say now whether any part of the Plymothian was between you and the Victory when you first saw her? A. I couldn't say, but I knew at the time that nothing could stop the collision.

RE-DIRECT-EXAMINATION.

By Mr. SHARP:

Q. I understand you to say at this time you can't say whether some minutes or seconds elapsed from the time you first saw the Plymothian attempt to cross over from the west side until the collision occurred? A. No, sir, I can't; the period was very short. It was not several minutes—wouldn't any how be more than two or three minutes, probably less.

Q. But it was time enough to see the movements you speak of? A. Yes, sir.

Q. And first you saw the Victory heading for Lambert's
(626) Point light. You saw that coming up? A. That was some time previous I knew she was coming up the channel.

Q. And you saw her continue to come up the channel? A. No, I didn't see her. I didn't look for her again until the time of the collision.

Q. At that time you saw ——. A. She was still on the east side, and the other was crossing the channel and heading directly across the Victory's bows.

Captain CHARLES NELSON, on behalf of the Victory, sworn:

Examined by Mr. SHARP:

Q. State your name, age, residence and occupation? A. Charles Nelson, 65, 171 Boush street, Norfolk; pilot.

Q. On the 12th day of November, 1891, which was the day of the collision between the Victory and Plymothian, where were you? A. I was on the bridge of the Victory.

Q. What were you doing there? A. I was pilot of the ship.

Q. Who was on the bridge with you? A. The Captain was there, and I think the Mate was there.

Q. Who was in command of the ship? A. The Captain, I suppose.

Q. Who was directing the navigation of the ship as pilot? A. I was pilot.

Q. Who made reports to you? Did anyone from the bridge make reports to you of what occurred? A. No, sir; no one at all. I could see myself what was going on.

(627) Q. Well, at what time, about, did you leave Hampton Roads? A. I think it was about three o'clock, somewheres. I didn't notice the time particularly.

Q. You came up that evening piloting the Victory from Hampton Roads up to Craney Island, say? A. Yes, sir.

Q. Did you meet any foreign vessels on the way? A. Met one.

Q. What was that? A. I don't recollect her name.

Q. Laden? A. Yes, sir; going down. I don't know her name.

Q. Give any signals? A. I don't think she did; I don't remember any.

Q. Did you meet any river steamers? A. Yes, sir; met two at Craney Island.

Q. Saw one at Craney Island? A. Yes, sir; Craney Island.

Q. Where was the other one? A. Just behind her.

Q. Did they give any signals to you? A. I think they did; yes, sir.

Q. What signals? A. Two whistles; they were going in the swash channel.

Q. Which side of the channel were they on? A. The west side.

Q. Which side did you take? A. The east side; because I knew they were going in the swash channel.

Q. Why did you take the east side? A. To give them room to go in the swash channel just below Craney Island.

Q. In coming up did you meet any sailing vessels? A. (628) There was one on my starboard bow, right close to the buoy just before the collision.

Q. Did you pass any before that? A. Yes, several.

Q. One was on your starboard bow just before the collision? A. Yes, sir, a small vessel of about 50 tons, I suppose. About two points on my starboard bow.

Q. Were these sailing vessels going down the stream? A. Yes, sir.

Q. On which side of the channel were those sailing vessels? A. They were about in the middle, I think, and on the western side.

Q. Where was the Victory. Did the Victory give any signal to the Plymothian? A. Yes, sir, we blew two whistles twice.

Q. When you gave the first two signals how far was she from buoy No. 7? A. About half way between Craney Island light and the buoy.

Q. Then she gave—? A. Two more.

Q. How long after she gave the first two? A. I suppose about a minute or a couple of minutes.

Q. She repeated the whistle? A. Yes, sir.

Q. Well, what did you observe from the Plymothian when you gave the first two whistles to the Plymothian? A. He was coming down the stream and ported his helm across my bow.

Q. When did you first see the Plymothion? A. Saw her coming out of the slip.

Q. What slip? A. Lambert's Point pier.

Q. Where did she go? A. Went over to westward towards the Merrimac buoy.

(629) Q. On which side of the channel did she go? A. On the western side.

Q. Are you familiar with the channel? A. Yes, sir, I think I am.

Q. And you know she was on the western side of the channel? A. Yes, sir.

Q. You saw her go over from Lambert's Point pier? A. Yes, sir, and straightened down the middle of the channel.

Q. You saw her straighten down the channel on that side? A. Yes, sir.

Q. How far did she go down that channel on that side before she made another change? A. About two or three hundred yards.

Q. Then she did what? A. Ported her helm and steered over to the east. I blew two whistles and she steered over to the east and crossed my bow.

Q. Did she ever get over to the east from the west? A. Yes, sir, got close enough to strike her about the bridge. I was backing.

Q. You first saw her cross the channel from Lambert's Point pier obliquely over to the western side of the channel? A. Yes, sir.

Q. Then saw her go two or three hundred yards down the western side of the channel? A. Yes, sir.

Q. And then saw her change her helm and cross over to the scene of the collision? A. Yes, sir, about N. E. by E.

Q. When she ported her helm? A. When she ported her helm.

(630) Q. How was she heading at the time of the collision? A. About N. E. by E., I should judge.

Q. You saw her pass the Merrimac buoy, did you? A. Yes, sir.

Q. And go down the western side? A. Yes, sir.

Q. Did she appear to pass close to the buoy? A. Some little distance from it.

Q. And went down on the western side and then she headed about how many points? A. I should think about N. E. by E.

Q. When she first ported her helm after straightening her course down the western side of the channel how was her course first—how many points? A. I suppose about four points across my bow.

Q. You saw her on the western side of the channel? A. Yes, sir.

Q. And your vessel was on the eastern side? A. Yes, sir. I went on that side to give him room; I saw him coming out.

Q. What point was she heading when on the eastern side of the channel? A. I suppose about S. ½ W. probably.

Q. Heading for what? A. A little to the west of Lambert's Point—about half a point, I suppose.

Q. After coming from Craney Island up that eastern side of the channel did the Victory at any time get into the mid-channel? A. No, sir; not after she passed the light-house.

Q. I mean up to the collision did she at any time get in the middle of the channel? A. No, sir; she was in the eastern side.

Q. Did she at any time get on the western side? A. No, sir.

Q. She kept along the eastern shore? A. Yes, sir; as (631) close as I could.

Q. And when she was going in that direction the Plymothian crossed the channel and crossed your bows? A. Yes, sir.

Q. And in that way the collision occurred? A. Yes, sir.

Q. Now, you say you were half way between Craney Island and buoy No. 7 when you gave the first two whistles to the Plymothian? A. Yes, sir; about that, I should think. But I was on the eastern side.

Q. Well, what whistles did the Plymothian give to the Victory? A. I couldn't distinguish it. There were several blowing over that way. I asked the captain if he could make it out, but he couldn't. There were several whistles blowing over in that direction.

Q. You couldn't tell what it was? A. No, sir.

Q. And you then repeated it? A. Yes, sir; repeated twice.

Q. Then what? A. We stopped the ship and commenced to back. I saw him porting and coming across our bow. I found he was going to strike us if he came on, and I came to the conclusion that his gear had got foul or something.

Q. You commenced to back the ship at the time she ported her helm to cross over from the west to the east side? A. Yes, sir; I found if I didn't do that I would strike the ship.

Q. How long was he backing his engines before the collision occurred? A. Two or three minutes—three or four—somewheres along there.

Q. You didn't look at your watch? A. No, sir.

Q. But you judge it was three or four minutes? A. Yes, sir.

(632) Q. Was the Victory moving backwards or forwards or standing still at the time of the collision? A. I suppose she was moving ahead a little—a very little. Of course she would have to be moving ahead to strike the ship.

Q. She had been backing three or four minutes? A. I suppose about three or four minutes.

Q. Backing her engines? A. Yes, sir; it takes some time with those ships; they don't back very quick.

Q. She had been backing her engines three or four minutes, but she was still moving ahead herself? A. Yes, sir, slightly. She had to do that to strike the ship.

Q. Did you notice the backwater, if any, at the time? A. There was some alongside. They always force it up.

Q. You saw it at the time? A. Yes, sir.

Q. And it was running? A. About amidships.

Q. What did that indicate? A. That she was about topped I suppose.

Q. Then she was nearly stopped? A. Yes, sir.

Q. What was her speed between Craney Island and the collision? A. I don't suppose over three miles an hour. I had slowed her down at Craney Island.

Q. Up to Craney Island you had been going faster? A. Yes, sir. She slowed down, of course.

Q. You slowed down at Craney Island and she was gradually slowing down until at the time you backed your engines she was going three or four miles an hour? A. Yes, sir.

Q. That was from Craney Island up to the time you backed your engines? A. Yes, sir.

(633) Q. That was from slowing her down before you backed? A. Yes, sir.

Q. And the result of backing your engines three or four minutes was to make her nearly stationery at the time of the collision? A. Yes, sir. If we had been going ahead fast we would have gone right through her.

Q. You said something about a schooner? A. There was a schooner on my starboard bow; I couldn't port my helm; it was impossible.

Q. When the Plymothian ported her helm you couldn't port your helm; why? A. I would have run into the schooner. I didn't want to sink the schooner.

Q. Was there anything the Victory could have done that she didn't do? A. No, sir, nothing in the world.

Q. If she had ported she would have run into the schooner? A. Yes, sir.

Q. She did back her engines? A. Yes, sir.

Q. Suppose she had starboarded, what would have happened? A. Made a mess of both of them; both would have run ashore.

Q. Then the only thing she could do was to back her engines? A. Yes, sir.

Q. She backed three or four minutes? A. Yes, sir, until she struck the ship and then backed out of her.

Q. She commenced to back from the time the Plymothian began to move under port helm from the western side of the river? A. Yes, sir, that's right.

Q. Do you know what is the western side of the channel? A. Yes, sir.

(634) Q. You know the space between the middle and the western buoy line. Is that the western half of the channel? A. Yes, sir. We were on the eastern side.

Q. And you say the Plymothian when you saw her after she moved from Lambert's Point— A. Was over towards the Merrimac buoy.

Q. She crossed over to the western side and moved down that space between the middle of the channel and the western buoy line several hundred yards and then moved obliquely across the channel from to the east and ran across your bows? A. As soon as I saw that I commenced to back.

Q. Then you saw the Plymothian twice cross the channel? A. Yes, sir.

Q. First from Lambert's Point to the Merrimac buoy, and afterwards under a port helm cross your bow over to the eastern side of the channel? A. Yes, sir, right alongside the buoy.

Q. How near were you to the buoy when the collision occurred? I suppose 50 or 60 feet.

Q. So close as that at the time of the collision? A. Yes, sir.

Q. And in order to make that collision the Plymothian came over from the western to the eastern side of the channel? A. Yes, sir.

Q. And the Victory kept on the eastern side? A. I kept on that side to keep out of her way. I saw her come out and I kept on that side to let her straighten out.

Cross-Examination.

By Mr. Floyd Hughes.

(635) Q. You don't know what time the vessel left Hampton Roads? A. No, sir. I didn't look.

Q. What speed did you make up to Craney Island? A. I suppose five or six miles an hour—about five knot.

Q. And how was the tide? A. It was about a little flood tide.

Q. Wan't strong? A. No, sir, the tide was about slack I think. There was very little tide there anyway in the channel.

Q. Where did you pass that English steamer? A. between Lambert's Point and Boush's Bluff.

Q. How far from Boush's Bluff light-ship? A. About a quarter of a mile—hardly that.

Q. To the south of the light-ship? A. Yes, sir.

Q. In what portion of the channel had you been moving before that time? A. Keeping on the western side.

Q. How did you pass that ship, starboard to starboard or port to port? A. Starboard.

Q. Passed her leaving her to your starboard? A. My starboard.

Q. Passed starboard to starboard? A. Yes, sir.

Q. You say there were no signals exchanged? A. No, sir, I don't think there was.

Q. What is the course from the light-ship up to Craney Island? A. About S. by E.

Q. About a point to the east of south? A. Yes, sir.

(636) Q. Well, describe the regular courses between the light-ship and Lambert's Point? A. Well, about south—S. ½ W. We generally go by judgment; may be a little to the east. You can't run any regular course there. You might be a little to the east and steer a little S. by W., or might be to the west and steer S. by E,

Q. Coming up the middle of the channel don't you haul up when you get near Craney Island? A. Certainly I do.

Q. What course do you take then? A. Couldn't get there if I didn't haul up.

Q. That's what I thought. What course do you take, then? A. Where from?

Q. When you haul up at Craney Island? A. About S. ½ W.; it depends on what part of the channel you are in.

Q. About how does the end of the pier bear from Craney Island light? A. I never noticed particularly, but about S. ½ E.

Q. Where did you pass the first of those river steamers? A. At Craney Island.

Q. Did you pass one before that? A. One below; yes, sir.

What steamer was that? A. I don't recollect her name.

Q. What steamer did you pass at Craney Island? A. I think it was the Newport News boat.

Q. The "Louise?" A. I think so

Q. How far behind her did you pass the next steamer? A. About a hundred yards, I suppose.

(637) Q. What steamer was that? A. I think it was the "Luray."

Q. Do you remember passing the "Virginia Dare?" A. That's what it was—the "Virginia Dare."

Q. Before you met these steamers were you on the middle of the channel, the east or west side? A. Middle of the channel.

Q. You say those steamers take the swash channel going over towards the west, the Virginia Dare running to Suffolk and the Louise to Newport News? A. Yes, sir.

Q. And in order to give them room to pass to the west you went to the east? A. Yes, sir, I knew they were going through that channel; they always do that.

Q. You, of course, starboarded and went to the east of the middle line of the channel? A. Yes, sir, and kept that all the way up until I struck the Plymothian. I saw the ship coming out and coming down, and that was the only way to run. I wouldn't attempt to go to the west and just bother him.

Q. You took the eastern half of the channel within a hundred yards of Craney Island in order to pass the Virginia Dare? A. Yes, sir, that's right.

Q. And you held that? A. Held that all the way up until I struck the ship.

Q. You motioned only one schooner, and that the schooner — A. Well, one below that.

Q. Below Craney Island? A. Yes, sir. One schooner on my starboard bow about two points. I couldn't port to save my life without sinking the schooner.

(638) Q. At the time of the collision there was one schooner on your starboard bow? A. Yes, sir.

Q. How was she, in mid-channel? A. A little east of the mid-channel, very close; I was moving east of her.

Q. You directed your course in reference to that vessel, did you? A. I didn't want to run into her, because I saw the ship coming down on the western side, and of course I went to the eastern side to give her room to go down to the west.

Q. It was because you saw the Plymothian was on the western side and not because you saw the schooner? A. Because the schooner was there too. I didn't want to go to the west of the schooner and block the channel up. I wanted to give her all the room I could.

Q. Before you got to the schooner, the schooner being to the east of the middle line of the channel, the reason you didn't pass her on your east or port hand was because you saw the Plymothian on the western side of the channel? A. And I wanted to give her all the room I could.

Q. And it was not because you saw the schooner in that position, then, that you took the eastern side of the channel. You could have gone to the west but for the Plymothian? A. That was the proper way to go.

Q. You took the eastern side because the Plymothian was on the western side, and not because— A. And at the same time it was my duty; I saw a clear track. There were some vessels on the western side and I didn't want to get tangled up.

Q. Suppose the Plymothian hadn't been there at all, couldn't you have gone to the westward? A. No, sir, I (639) wouldn't have done it. There were some schooners on the western side and I had no business on the western side. I saw a clear track on the eastern side.

Q. Isn't your regular course on the western side? A. We don't steer a regular course. I don't want to get tangled up when I see a straight course.

Q. When the way is clear what is your duty? A. Cut off all you can.

Q. Go to the east or west? A. Yes, sir.

Q. Suppose you are going up the middle of the channel and saw a vessel coming down the middle of the channel? A. I would make the best cut off I could. You have to use judgment about things of that sort. If the vessel is in the middle of the channel we don't want to run into her if we can help it. If we see a vessel tacking we have to use our best judgment about it.

Q. How was that schooner going, down or up the river? A. Going up the same way we was.

Q. Coming up the river? A. Yes, sir. Very light wind; just drifting along.

Q. You remember the wind at that time? A. It was sort of calm.

Q. Making very little progress? A. Afterwards the wind came out to the east.

Q. Practically drifting along with the tide? A. That was it.

Q. Very little wind? A. Yes, sir.

Q. Did you or not starboard your helm to go to the east (640) of that schooner? A. Certainly I did. I didn't want to run into her.

Q. Would you have run into her if you had not starboarded your helm? A. I was giving the Plymothian channel to go down to the westward of me.

Q. And she was so far to the east of the middle line of the channel that you had to starboard to go to the east of her? A. There was plenty of water for me, and I ran over to give the Plymothian room to come down the west of the

middle of the channel, and coming to the eastward she had to cross my bow, and the collision occurred.

Q. How far was the schooner from your starboard bow at the time of the collision? A. I suppose 50 or 60 feet.

Q. Right close aboard? A. Yes, sir.

Q. A little bit on your starboard bow and about 60 feet off? A. Yes, sir.

Q. The collision occurred right at the buoy? A. Yes, sir.

Q. So she was pretty close over to the eastern side of the channel? A. Yes, sir. I did that to give him room to go down on the western side of the channel. I know how ships turn and straighten.

Q. About the time you passed Craney Island light-house where was the Plymothian? A. She was coming out of the slip then, at Lambert's Point.

Q. Had she gotten out into the river at the time you passed Craney Island? A. She was out in the river.

Q. Just about buoy No. 9? A. I suppose she had just (641) started out.

Q. It was at that time that you were passing the light-house? A. Yes, sir.

Q. You can't give the time; you didn't look at the clock? A. No, sir; didn't look at the clock.

Q. You think you were coming about five miles an hour before you got to the light-house? A. Yes, sir.

Q. And after you passed the light-house? A. We slowed down just so the engines would turn around.

Q. You say you were making about three miles? A. I don't know we were making that—just so the engines would turn over.

Q. You say the tide was almost slack? A. Yes, sir; very little tide there anyway.

Q. How long would it take you to check the headway of your vessel? A. I suppose three or four minutes.

Q. When you were moving that way with reversed engines? A. I suppose about three or four minutes.

Q. You think if the Victory was making three miles an hour and you ordered her engines—? A. I hardly think we were going that after we passed Craney Island.

Q. If the Victory was moving less than three miles an hour and you ordered her engines full speed astern, it would take three or four minutes to check her speed? A. I couldn't form any idea of the time. Some ships take longer than others.

Q. And you think your engines were going back two or three minutes or three or four minutes? A. Yes, sir.

Q. As I understand your testimony, it was chiefly be-

cause the Plymothian was on the west side that you directed your course to the east side? A. To give her room
(642) to go down the mid-channel; that's why it was done, for I always make it a rule, if I see a ship coming, to give him all the room I can, to keep out of the way.

Q. How many points to starboard did you have to put your ship to get over on the eastern side of the channel? A. Going about one course all the way up there; maybe one point, or three-quarters of a point. When you get up to the light-house you have to change course more to the westward.

Q. Then you had to haul around to buoy 7? A. Near the same course from the light up, clear up to Lambert's Point. You have to starboard a little bit to get on the eastern side of the channel.

Q. About how many points did you have to starboard to get on the eastern side of the channel? A. About half a point or three-quarters of a point I never noticed; but going up a place like that looking out for vessels we don't steer by the buoys in a place like that. Down below that point we steer by compass, but up there we run by judgment altogether.

Q. You said you passed the Virginia Dare about 100 yards, or at least 100 yards from Craney Island. What other vessels did you pass from that time up to the collision? A. I never know the vessels. I didn't know the vesel alongside of me—I couldn't give her name.

Q. You were directing your movements with reference to the Plymothian? A. Yes, sir; giving her room to go down on the west side of the chip channel. I saw a track right up there.

(643) Q. Did you notice the speed of the Plymothian after she passed buoy 9? A. No, sir; I did not.

Q. Did you notice it after she directed her course from the western side of the channel over to you? A. No, sir.

Q. You couldn't estimate her speed? A. No, sir.

Q. You don't know whether she was moving ten miles or two? A. She wasn't moving ten.

Q. I just want your judgment? A. I couldn't tell you.

Q. You couldn't form any idea of how fast she was moving? A. No, sir.

Q. At the time of the collision was she making headway? A. Going very slow. She was going just as slow as we could get; we shut her down at the light-house.

Q. I am talking about the Plymothian? A. I don't know anything about her.

Q. I asked about the speed of the Plymothian? A. I couldn't tell you to save my life.

Q. At the time of the collision was she making any headway? A. Some headway, of course.

Q. And you were making headway? A. Some little; we were backing at the time, but the ship had some headway.

Q. What were all the whistles you heard from the Plymothian from the time you saw her at buoy 9 to the collision? A. I couldn't tell you any distinction. There were several whistles blowing at the time, and I couldn't tell you.

Q. Several whistles about Lambert's Point, and you couldn't tell? A. No, sir. I blew two whistles twice.

(644) Q. You say when you blew the first set of whistles you were half way between Craney Island and buoy 7? A. Yes, sir.

Q. And she was on the western side of the channel? A. Yes, sir; I saw steam.

Q. Had you seen her blow any before that? A. No, sir.

Q. Had you seen any steam come out of the whistle pipe before then? A. No, sir, I had not.

Q. About two minutes after that, you say, you blew your second set of whistles? A. Yes, sir; I asked the captain—

Q. And then you heard one whistle from her? A. No, never heard one whistle from her.

By Mr. SHARP:

Q. You say, I understand, that you saw steam from the Plymothian after you blew the first set of whistles but not before? A. No, sir, not before.

By Mr. FLOYD HUGHES:

Q. You saw this steam from the whistle between the time you blew your first set of whistles and the time you blew your second set of whistles? A. Sir?

Q. You saw this steam from the Plymothian's whistle between the time you blew your first two and the time you blew your second? A. Yes, sir.

Q. And they were about two minutes apart? A. Hardly that; not more than two.

Q. Between your two signals? A. Yes, sir.

Q. When did you first observe her, as you say, port her helm? A. She straightened down a few minutes and then ported her helm just below the Merrimac buoy. I blew (645) two whistles before he straightened down.

Q. You blew two whistles before he straightened down? A. Just about the time he straightened down, I should have said.

Q. When was it you first observed him port his helm? A. After he passed the Merrimac buoy and got a little ways below.

Q. How long before you blew your other whistles? A. It wasn't a minute, I suppose.

Q. How long was it from the time you blew your second set of whistles and blew your danger signals? A. It wasn't a minute. I commenced backing them.

Q. And you think it was then about three minutes, or possibly four minutes, before the collision from the time you backed? A. I should judge about that—somewheres along there.

Examined by Mr. MYNDERSE:

Q. Do you know what the full speed of the Victory is? A. No, sir, I do not; I suppose about 9 or 10. I wouldn't like to say.

Q. She came up from Hampton Roads to Craney Island under what you would call half speed, then? A. Hardly half speed.

Q. And then when you got to the south of Craney Island her speed was still less? A. Yes, sir; slowed down as slow as she could go; just so the engines would turn over.

Q. And where was the Plymothian when you first saw her? A. Coming out of the slip at Lambert's Point.

Q. Left her pier? A. Yes, sir.

Q. Clear of the pier? A. Yes, sir; when I first saw her (646) she had left the pier coming out.

Q. Clear of the pier? A. Yes, sir, coming to the west and I was going to the east.

Q. Going out of that pier you go out under port helm, of course? A. Certainly.

Q. You saw her before she was heading down the river? A. Yes, sir; that is the reason I kept close to the eastern side, to give her room, because he couldn't turn the ship to go to the east of me—he was bound to go to the west.

Q. Have to come out under port helm if you are bound out? A. Certainly, and you couldn't get on to that side and straighten down there.

Q. Now can you say there was any time that he wasn't under a port helm? A. Of course, in straightening down by the Merrimac buoy, he was straightened down mid-channel or a little to the west side, I suppose.

Q. But about mid-channel? A. I should think she was a little on the western side.

Q. What effect would a flood-tide have on him there? A. No tide scarcely at all.

Q. You don't calculate the flood-tide made any difference

at all? A. Both ships were in the water afloat and it didn't make any difference; they floated together. If a ship is ashore, then the tide might affect her, or a vessel lying at the dock.

Q. Is there any current in the Elizabeth river? A. Very little.

Q. It makes a difference with the current and tide (647) against each other! A. Both ships were in the river; it only makes very little difference.

Q. Can you recollect any particular time or moment when you would say that the Plymothian was not under aport helm? A. Yes, sir; she straightened down a minute or two, and put her helm aport.

Q. What do you mean by a minute or two; you didn't time it? A. No, sir. I had something else to do.

Q. But you noticed— A. I noticed she straightened down and then ported her helm and came across my bow.

Q. You noticed when she got in mid-channel she was holding the mid-channel and then she came across? A. I was pretty certain her wheel had got jammed.

Q. You noticed when she came out and got about mid-channel she hung in mid-channel some time, and then she went to the eastern side? A. Yes, sir.

Q. You don't desire to correct that in any way! A. No, sir.

Q. And as for the period shs was hanging in mid-channel, it may have been a minute or two? A. Going down, sir.

Q. Hanging down the mid-channel? A. Yes, sir.

Q. And that was about one or two minutes? A. Yes, sir, I suppose so.

Q. You say you heard no whistle from the Plymothian? A. There were several blowing around there, but I couldn't distinguish.

Q. And you personally saw no steam from the whistle. Did the captain report it to you? A. I asked him to keep a lookout for whistles—I was busy.

(648) Q. Then, as I understand, you personally did not see steam from the Plymothian's whistle? A. I saw steam flying about there but I couldn't tell whether it was one or two whistles.

Q. Did you identify it as being a part of a signal at all? A. No, sir, I did not; she may have been blowing steam out of her steam pipe.

Q. You say you relied on the captain; what did he tell you? A. Didn't tell me anything.

Q. Nothing was said to you about the Plymothian's whistle or the steam from the Plymothian's whistle? No talk at all on the subject? A. No, sir.

Q. You didn't consider the Plymothian's whistles at all, then? A. I didn't know she was blowing at all.

Q. You didn't know and had no occasion— A. If she had been blowing I couldn't have gone to the westward of her. I blew two whistles and she answered them, I suppose.

Q. You didn't know and had no information that the Plymothian was blowing any whistles or trying to blow any whistles; that's right? A. Yes, sir.

Q. And the captain didn't say anything to you about it, and you didn't say anything to him about it? A. I asked him to look out for him.

Q. But he didn't say anything to you about her whistles? A. I don't think he did.

Q. Did you say anything to him about the Plymothian's movements? A. No, sir.

Q. Did he say anything to you about her? A. Until he was crossing my bow and I told him to stop and back her. (649) Q. Did you say anything to him about the Plymothian's movements? A. No, sir; I told him to stop and back her. When I saw she was going to run across our bow I told him to stop and back her; if I hadn't done that she would have run into the Victory.

Q. Did you say anything to the captain about the Plymothian's movements? A. Yes, I told him to stop and back her

Q You told him to stop the Victory? A. Yes, sir; that's what I meant. I wasn't aboard the Plymothian.

Q. And you didn't say anything to the captain about the Plymothian's movements? A. I thought he was going to cross our bow.

Q. You say you told the captain you thought she was going to cross your bow? A. I said the ship was—I saw him porting his helm and told him to stop, and back her quick.

Q. I know that; what I am trying to get at is, did you tell Captain Elcoate, the captain of the Victory, that the Plymothian was trying to cross your bow? A. I saw what she was going to do, and told him to stop and back her.

Q. But you didn't tell him she was crossing your bow? A. No, sir; I could see that myself.

Q, And he didn't tell you? A. No, sir; I told him to stop the ship and back her—give her full speed.

Q. Did you say anything to Captain Elcoate— A. I said she's going across our bow, stop her and back her quick.

Q. Did you say anything to Captain Elcoate about the Plymothian's helm? A. I said they must have made a mis-

take in the helm, got jammed or something of that sort. I (650) have seen them get jammed.

Q. You said that? A. Yes, sir, I said they must have made a mistake, trying to cross our bow.

Q. Did he say anything to you about the helm of the Plymothian? A. I don't know that he did. I know he was crossing our bow, and I was trying to keep from running into him. I say the mark on the ship itself shows who was in fault.

RE-DIRECT-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. This happened three years ago, nearly, didn't it? A. I don't recollect the time exactly.

Q. You don't pretend to recollect everything that was said on an occasion like that three years ago? A. Yes, sir, anything like that: yes, sir.

Counsel for the Victory here offers in evidence the Supervising Inspector Rule No. 1 for Pilots, which reads as follows:

"When steamers are approaching each other 'head and head,' "or nearly so, it shall be the duty of each steamer to pass to the right, or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right, or port side, of each other. (651) But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting "head and head", or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left, or on the starboard side of each other."

"NOTE. In the night steamers will be considered meeting "head and head," so long as both the colored light's of each are in view of the other".

Also the Second Situation in the Diagrams of the Supervising Inspectors rules, which is as follows:

SECOND SITUATION.

Here the green light only will be visible to each, the screens preventing the red light from being seen. They are, therefore, passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle.

Counsel then offers in evidence the libel and answer in the original proceeding of S. Elcaote, Master, vs. the Plymothian, the depositions of South, Rankin and Wigham subject to the objections, and the depositions of the crew of the steamship Victory which have been heretofore taken.

Counsel for the Victory here rest their case.

(652) Mr. JOHN BROWN, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. Give your name, age, residence and occupation? A. John Brown; age 62; occupation, light-house keeper, residence, Norfolk City.

Q. Were you keeper of Craney Island light-house in November, 1891, when this collision happened? A. Yes, sir.

Q. I wish you would state to the court what happened that evening? A. I noticed the Victory when she came up that evening past the light-house. She came as close up to the light-house as she could to keep afloat, and, I thought, too close, and I looked up the river and seen the other steamer come out from the pier; she was right to the east side of the channel. There were some whistles exchanged and I saw the Plymothian headed to the east and before the other one headed to the east, and she kept to the east all the time the Plymothian did, and the other one left the west side and headed right over to her and was very close to her before she reversed her engines and was backing when she struck her.

Q. She had her stern towards you? A. Yes, sir. I could see her propeller hitting the water.

Q. You saw her when her engines were reversed? A. Yes, sir, saw that by the water.

Q. How long was that before the vessels came together? A. A very short time.

Q. Can you approximate the time? A. No, sir, I cannot, but a very short time.

Q. What was the speed of the Victory when she passed? (653) A. Very fast. I should judge all of 12 knots—going exceedingly fast for a tramp.

Q. A very swift speed? A. Yes, sir, and kept her speed up until she reversed her engines, too.

Q. You say you saw the Plymothian come out and keep on the eastern side of the river? A. About the middle—wasn't more than the middle of the channel before she kept to the east all she could keep to keep from going ashore.

Q. And that was before the Victory moved to the east? A. Yes, sir.

Q. Could you judge of the speed of the Plymothian? A. I couldn't swear, but she was going slow.

Q. Not going as fast as the Victory? A. No, sir, she was a loaded ship and was not going as fast—hadn't got her speed on her in fact.

Q. Where were you standing? A. On the light-house right fronting the channel.

Q. Inside or outside? A. Outside.

Q. Had you noticed any river steamers passing down? A. No, sir, I believe there were some little boats down there, but I don't think there was any in the way. I believe there was one or two little sloops.

Q. You hadn't noticed the river until the Victory passed the light-house? A. She attracted my attention. The Plymothian hadn't gotten down there then.

CROSS-EXAMINATION.

By Mr. SHARP:

(654) Q. You say you saw the Victory pass Craney Island light and rapidly pass over to the eastern side of the channel? A. Yes, sir.

Q. Going about 12 miles an hour? A. Yes, sir.

Q. She went over to the eastern side of the channel? A. Yes, sir, and struck the Plymothian on the eastern side of the channel.

Q. I am not speaking about her striking the Plymothian. It took some time to get to the eastern side? A. She hadn't slackened speed.

Q. The first you saw was the Victory passing the light-house at about 12 miles an hour, rapidly moving over to the eastern side of the channel. Is that what you say? A. Yes, sir, that's what I said.

Q. And you say you saw the Plymothian at the same time in mid-channel? A. No, sir, not that time. When I saw her she was way up the river further, going over to the eastern side to get out of the way of the Victory.

Q Where was the Victory when you first saw the Plymothian? A. A little to the south of the light-house.

Q. When you first saw the Plymothian? A. Yes, sir, bound to.

Q. And the next thing you saw the Victory move rapidly over to the eastern side of the channel? A. Yes, sir.

Q. Then you saw the Plymothian in mid-channel move over to the eastern side? A. No, I saw the Plymothian on the eastern side of the channel then, edging to the eastern side of the channel to get out of the way of the Victory.

(655) Q. Where was the Plymothian when you first saw her? A. When I noticed her she was about half way—

Q. Did you see her come out of the pier? A. Yes, sir, but I was noticing the Victory.

Q. But you say you saw her? A. I saw her coming out from the pier.

Q. And at the same time you saw the Victory some distance south of Craney Island light? A. I saw her right abreast of Craney Island light when I saw her first.

Q. And you saw her move rapidly at the rate of 12 miles an hour to the eastern side of the channel? A. No, sir; she passed to the south straight up the channel.

Q. Then she didn't pass over—? A. Yes, sir; but not right at the light-house.

Q. How far had he gone before he attempted to cross, a half of a mile? A. About that, sir. I am not saying that positively; this is a mere judgment about that. I should judge.

Q. That's your judgment now. You don't state it as a fact? A. No, I am not stating facts; I am stating my judgment.

Q. Now you say your judgment at the present time is that the Victory moved in mid-channel for half a mile before she went to the eastward? A. No, sir; she kept to the west side until she reversed her helm, put her helm to starboard. She passed right up the channel when she passed the light-house.

Q. Which occupied the western side? A. The Victory.

Q. She passed up the western side? A. Yes, sir, until (656) she put her helm over and went across.

Q. Then it is not a fact that she was in the middle of the channel? A. She kept the western side when I seen her.

Q. The Victory then, when you first saw her, kept about half a mile up on the western side of the channel, and then crossed to the eastward? A. Yes, sir.

Q. And at that time the Plymothian was in the middle of the channel? A. No, sir, the eastern side.

Q. But she had been in the middle? A. I judge so; but when she seen this vessel she edged over to the east.

Q. Had she ever been on the eastern side? A. Yes, sir, I suppose so, when she came out from the pier—except when she moved out to get away.

Q. Did you see the Plymothian in the middle of the channel? A. No, sir. As a matter of judgment, I think she was on the eastern side.

Q. Close to the eastern buoy line all the time? A. Yes, sir.

Q. And the Victory close to the western buoy line? A. Yes, sir.

Q. And after the Victory had gone along about half a mile on the western buoy line, she crossed over to the east and ran into the Plymothian? A. Yes, sir.

Q. Did the Victory cross the Plymothian's bow? A. No, sir; struck her amidships.

Q. That is, the bow of the Victory struck the Plymothian amidships? A. About amidships.

Q. And the Plymothian did not strike the Victory at (657) all? A. No, sir.

Q. You saw that? A. Yes, sir, saw that; she didn't strike the Victory because the Victory struck her.

Q. Did you see the Louise pass down? A. No, sir; its an everyday occurrence, and I didn't notice it.

Q. See the Virgnia Dare? A. She passes down daily, and I didn't pay any notice.

Q. Did you see the third steamer? A. No, sir.

Q. You say you didn't see them? A. They may have been there, I didn't see them.

Q. But you saw the Victory? A. Yes, sir; she attracted my attention by her speed.

Q. You don't say whether these three steamers passed down or not? A. I didn't see them.

Q. You did see two or three schooners; where were they? A. Up about the Merrimac buoy somewheres on the flats.

Q. On the western side? A. Yes, sir.

Q. No schooners in the mid-channel? A. Not that I seen. There were schooners there; but in my judgment they were on the western side.

Q. You didn't see three schooners between buoy 7 and Craney Island? A. I saw two.

Q. You saw two between Craney Island and ——. A. Lambert's Point buoy; but I don't think they were in the way of the vessels.

Q. But you saw the schooners? A. Yes, sir.

Q. How many? A. I think I seen two.

(658) Q. Between buoy 7 and Craney Island? A. Up there somewheres.

Q. All you know is the Victory was on the western side and the Plymothian on the eastern side? A. Exactly.

Q. And that's the way they ran? A. Yes, sir.

Q. And the collision occurred by the Victory running over on the eastern side from the western side? A. Yes, sir.

Q. And the Plymothian kept the eastern side from the time she passed Lambert's Poiut buoy until the collision? A. Yes, sir.

Q. And you saw all that from Craney Island? A. Because I couldn't help seeing it.

Q. And you didn't see the steamers pass. A. I didn't see them pass; it is an every-day occurrence, and I didn't notice them. They might have passed, but I didn't notice them.

Q. How far was the Victory from Craney Island at the time she crossed from the west to the east? A. I told you before about half a mile. I didn't measure the distance.

Q. How far was the Plymothian from Lambert's Point at the time the Victory crossed from the west to the east? A. About half-way between the Lambert's Point buoy and the other one, I judge.

Q. Close upon the eastern side? A. Yes, sir.

Examined by Mr. ROBERT HUGHES:

Q. When those river steamers passed down, if they did pass down, would they have passed between you and the Victory or to the east of the Victory? A. The east, because (659) she was at the west side, I should say.

Q. Then in the position in which you saw the Victory, she was so close to the western side that there would not have been room? A. There would have been room, because they didn't draw as much water as the Victory.

Q. How does the western bank compare to the eastern? A. I am not a pilot, but, I judge, more up and down.

How long have you been on the Craney Island light-house? A. Ten years last January.

Q. Now, at Craney Island light-house does the channel from the west slope up sharp or gradually? A. Sharp.

Q. Very sharp? A. Not very sharp—water enough, you know, for river steamers to pass. All of them draw ten feet of water, I guess.

Q. Is the light-house exactly on the edge of the channel? A. No, sir, 50 yards from the edge of the channel, I judge.

Q. Just at the turn of the tide could even a river steamer pass between the light-house and the western edge of the channel? A. Yes, sir, at high tide they could; very often they go on the flats.

Q. Go on the flats at Craney Island light-house? A. Yes, sir.

Q. I understand you to say a river steamer at high tide can pass very close to Craney Island light-house? A. According to what kind of a steamer it is. The Washington and Baltimore boats can't, but the Louise and Virginia Dare can; it depends on the steamer.

Q. How close can the Louise pass to the light-house at high tide? A. Come right to it.

(660) Q. How close can they pass just at the turn of the tide from ebb to flood? A. Can't go on the flats at all—they would go aground.

Q. But just at the turn of the tide from ebb to flood they can't go on the flats at all? A. Part of them can come over the flats from Newport News, but not on the flats at Craney Island.

Q. Just at the turn of the tide, ordinary tide, how close can the Louise go to Craney Island light-house? A. Can't go at all; got to keep in the middle of the channel.

Q. Then don't the channel, when it commences to slope right there, go almost right down? A. I think it does. I am not a pilot, but that is my judgment.

Q. You have been there ten years and don't know how the channel goes? A. I am not there to know that; I am there to keep the light for these vessels.

Q. How far was the light-house from the scene of the collision? A. About half a mile or less—less, I judge.

Q. Whereabouts did the collision happen? A. To the southward of No. 9 buoy on the eastern side of the channel.

Q. Without giving the number of the buoy, nearest to what buoy, reckoning from Lambert's Point, did the collision happen? A. Where?

Q. Did the collision happen? A. Close to No. 9 buoy.

Q. Which do you call No. 9? A. The first black buoy from Craney Island to Lambert's Point.

Q. It happened, then, near the first black buoy from Cra-
(661) ney Island towards Lambert's Point? A. Yes, sir.

Q. And that is on the eastern side of the channel? A. Yes, sir.

Q. And you think that is about half way from the light-house? A. Yes, sir, about that. It is very easy measured.

Q. Do you know how the tide was at that time? A. I don't know, sir.

Q. Did you notice any vessels at anchor anywhere? A. No, sir; not in the vicinity of the collision.

Q. Notice any at anchor anywhere around? A. There are vessels always up on the flats opposite Lambert's Point, but I didn't notice them.

Q. They would have told you how it was, wouldn't they? A. I didn't notice any of them.

Q. It wasn't your business to notice those steamers? Q. I noticed them. This steamer was very close in, and I happened to notice her as she passed.

Q. And you didn't notice how the tide was? A. No, sir.

Q. And she looked as if she passed at about 12 miles an hour? A. Looked so; that's their general speed.

Q. Are you judging that from the Victory or general vessels? A. I am judging from the Victory as she was going through the water.

Q. Then you judged from her appearance she was going 12 miles an hour? A. Yes, sir.

Q. And I understood you to say at the time of the collision you could see she was backing. How could you tell (662) that? A. By the propeller heaving the water right up.

Q. You told by the propeller? A. Yes, sir, and by her speed.

Q. Did you notice her speed as she passed by Craney Island? A. I did; she was light and heaving the water up; but not as much as when she was going back.

Q. How was it going apparently? A. Going westward.

Q. Which way was the propeller turning? A. I couldn't tell that.

Q. You just noticed the water from the propeller, or did you notice the propeller itself? A. The propeller itself.

Q. You could see pieces of the blade? A. Yes, sir.

Q. Could you see it when she commenced to back? A. Yes, sir. I don't know that I saw it at the time. I could see. I knew from the way she was heaving the water that she had reversed.

Q. Did you notice that from Craney Island? A. Yes, sir.

Q. Did you want a glass? A. You don't want a glass to see it half a mile. You don't want one to see a steamer; it is a big object.

Q. A propeller is a big object at half a mile, but you saw it? A. Yes, sir; if you have got good eyes—.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. When you saw the Victory moving up on the western side of the channel, she wasn't so close as to prevent these river steamers coming down inside of her? A. No, sir, go ashore if they did.

(663) Examined by Mr. MYNDERSE:

Q. Do you know how much water these river steamers, the Louise and Virginia Dare draw? A. About 6 feet I judge. I don't know, but I judged about that.

Mr. ROBERT ETHERIDGE, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. Robert Etheridge; 40; Berkley; waterman.

Q. What were you engaged in in November, 1891, when the collision between the Victory and Plymothian happened? A. I was mate of the Commodore.

Q. Your business was, then, in the Commodore, to attend to the vessels at the pier, one of Twohy's fleet? A. Yes, sir.

Q. You are very well acquainted with the waters of the river in that vicinity? A. Yes, sir.

Q. Did you see the Plymothian leave her dock on that evening? A. Yes, sir.

Q. State where you were at the time? A. I was on the Commodore, sir, I suppose half way between Lambert's Point and Craney Island on the western side of the channel to meet the Victory in hopes of getting a tow from her; we thought she was going into the dock for coal and went to meet her and put her in.

Q. You say you saw the Plymothian leave the dock? A. Yes, sir.

Q. Just describe what occurred, exactly that you saw the Plymothian do from the time she left the dock up to the (664) time of the collision? A. All I seen her to do was to come out from the dock and straighten herself down the river—she passed 50 or 75 yards from buoy 9, and opposite buoy 9, or thereabouts, she blew the Victory one whistle, and I suppose, in probably a minute or probably not quite that long, she blew her one more. The Victory answered her with two. In a very little while afterwards he blew the Victory three whistles and reversed his engines. The Victory came on and struck him just aft of the bridge.

Q. At what point? A. Close to buoy No. 7, between 7 and 9.

Q. You heard the Plymothian blow her whistles as she left the dock? A. Yes, sir; heard her blow as she came out of the dock.

Q. Just describe how those whistles were? A. One whistle at a time, clear and distinct.

Q. You had no difficulty in hearing them? A. None whatever.

Q. There has been something said about there being water and steam in the whistle. Do you recollect anything of the kind? A. No, sir. I was standing on the forward deck of the Commodore and heard them distinct myself.

Q. And you were in the mid-channel? A. Yes, sir; over to the west, very near mid-channel.

Q. Under what helm did the Plymothian move when she left the pier? A. A port helm.

Q. And rounded the buoy about 50 yards from it? A. Yes, sir.

Q. How did she proceed down the channel then, on the middle or eastern side? A. Moved on the eastern side as
(665) close as she had any business; for a vessel drawing the draft she was I don't think she had any business being any closer in.

Q. And she continued moving down that eastern side and blowing the whistles you described up to the time you heard her blow those danger signals? A. Yes, sir.

Q. Describe the speed the Plymothian was moving from the pier down? A. She wasn't making over 6 miles an hour, sir; very deep loaded, and it was flood tide.

Q. The tide was against her? A. Yes, sir.

Q. And she came out, after having pulled out and left the pier, and went some distance before she got up speed of course? A. Yes, sir.

Q. Could you judge about when she put her engines full speed ahead? A. No, sir.

Q. But she hadn't gone more than 6 miles an hour when she sounded her danger signals? No, sir, not more than that.

Q. What was done then when she sounded her danger signals? A. Reversed his engines and rolled his wheel hard aport.

Q. You saw that? A. Yes, sir, I seen the rudder hard-a-starboard, which gave me to understand that the wheel was hard-a-port.

Q. You were not very far from the Plymothian? A. Not over 4 or 500 yards.

Q. You saw him pass to the eastward? A. Yes, sir.

Q. He didn't come to the west of you? A. No, sir.

Q. Where were you? A. I said we were on the western
(666) side of the channel, near mid-ships channel.

Q. And when he passed you he was hugging the eastern bank of the channel? A. Yes, sir.

Q. Now state what you saw in respect to the Victory? A. I just saw the Victory coming up the river, and we went out to meet her in order to get a tow.

Q. What speed was she making? A. I suppose at the least calculation 8 or 10 miles an hour.

Q. What part of the river was she moving in? A. As near midship channel as she could get—I mean the middle of the river.

Q. At the time the Plymothian was passing buoy No. 9 about where was the Victory? A. About Craney Island light, somewhere between that and No. 7: I couldn't say whether she was right opposite the light or not.

Q. And she was then in mid-channel? A. Yes, sir.

Q. Did you see her from that time to the point of collision? A. Yes, sir.

Q. At what rate of speed was she moving? A. As I said before, somewhere between 10 and 12 miles an hour. I remember saying to the Captain, "we will never get alongside of him at the rate he is going."

Q. You saw him at the time of the collision: what speed was he going then? A. I suppose when he struck the Plymothian he was going ahead as much as 5 miles an hour,

Q. But he had previously slacked speed? A. Yes, sir, he was backing when he struck the Plymothian.

Q. Do you know how long he had been backing? A. No, sir, I do not.

(667) Q. In respect to the whistles, as I understand, the Plymothian after passing buoy No. 9 gave one whistle? A. Yes, sir.

Q. Then gave another? A. Yes, sir, gave one whistle twice, but far enough distance apart for any steamboat man to have known they were not for a starboard helm.

Q. You heard those two separate whistles from the Plymothian before anything was heard from the Victory? A. Yes, sir.

Q. You then heard two whistles from the Victory? A. Yes, sir.

Q. And then the Plymothian blew three blasts of her whistle and went back on her engines? A. Yes, sir.

Q. Where was the collision, at buoy 7 on the eastern side of the channel? A. Yes, sir.

Q. When you first saw the Victory she was in mid-channel? A. Yes, sir.

Q. When did you observe her move from mid-channel to the eastern side? A. I couldn't tell you, sir, I was too far over to the west side. If I was right opposite him like this gentleman I could have told when he rolled his wheel over. I suppose it was when he blew the two whistles.

Q. That is the regular movement that the whistles indicate? A. Yes, sir. When he blew the whistles he notified the pilot on the Plymothian that he intended to—that he had starboarded his helm.

Q. You have stated that when the Plymothian reversed her engines she was making a speed of 6 miles with the tide against her? A. Yes, sir, not more.

(668) Q. At the time of the collision what speed—? A. Not making any—going back.

Q. You think she was going back—certainly not any headway? A. No, sir.

Q. Something has been said of schooners in the river. Were you in full view of the river at the time? See anything in the river? A. There were some oyster sloops, but nothing in the way to cause the collision.

Q. And you were but a short distance from the collision when it happened? A. Between 4 and 500 yards.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. What whistles did the Plymothian blow as she left the dock? A. Blew one whistle as she came out from the dock. That's nothing but a notice whistle.

Q. An ordinary dock signal? A. Yes, sir.

Q. And that is the only one she blew at that time? A. Yes, sir.

Q. Where was she when she blew the next whistle? A. About No. 9 buoy.

Q. How did No. 9 buoy bear from her when she blew the next whistle? A. I couldn't say. We were below her, down the river, and I couldn't tell; she was somewhere about No. 9 buoy.

Q. When she blew the first of her signal whistles, then? A. That was her first signal whistle.

Q. When she blew that first signal whistle she was some-
(669) where below No. 9 buoy? A. About No. 9 buoy.

Q. That is, between the pier and No. 9 buoy? A. About No. 9 buoy, I said.

Q. I beg pardon. I understood you to say she passed within 50 or 75 yards of No. 9 buoy? A. Yes, sir.

Q. Did you see her as she turned around that buoy? A. She had no turning around to do; she had already straightened down the river. After she left Lambert's Point and straightened down, the river is due north ¼ east from there to Craney Island.

Q. Do you think a ship can go on a perfectly straight course from Lambert's Point pier to Craney Island? A. I don't think anything about it; I know it.

Q. You think the Plymothian can go on a straight course from Lambert's Point to Craney Island? A. Yes, sir, after she starts out, I said; she was west of No. 9 buoy, and after she is west of No. 9 buoy she has got a straight course to Craney Island.

Q. Now coming back to the question I asked, does not the Plymothian, when she leaves Lambert's Point pier on a course to Craney Island, necessarily have to round buoy No. 9? A. Because she has to come around in that direction, but when she is opposite No. 9 buoy she has not got to go any further around. You asked me if she didn't go around No. 9 buoy.

Q. Don't she go around No. 9 buoy when she leaves Lambert's Point bound for Craney Island? A. Of course she did.

Q. You say she passed from 50 to 75 yards of it. Which side? A. West of it.

Q. She couldn't have gone to the east of it? A. No, sir.

Q. She was a loaded ship. Have you any idea of what her draft was? A. No, sir.

(670) Q. How was she in reference to No. 9 buoy when she gave her first signal to the Victory? A. I told you I didn't know, only she was to the west of it.

Q. How was her head pointing when she gave her first signal to the Victory? A. Pointing to the north; it might have been north by west, north ¼ west or north ½ west.

Q. When she gave her first signal to the Victory what part of the Plymothian did you see? A. The whole broadside.

Q. Which broadside? A. The port broadside.

Q. From the position you were in, did you see her starboard side? A. Yes, sir.

Q. When? A. When she came out from the pier.

Q. And when did she shut out her starboard side? A. When she straightened down the river.

Q. And then she was, as you judged, about 50 or 75 yards from No. 9 buoy? A. Yes, sir.

Q. What had the Commodore been doing before she went down to this point you speak of? A. Tied to the dock, sir.

Q. Had she carried out a barge about that time to anchor? A. I don't remember whether she carried out any barge or schooner; I don't remember anything about it; we were there doing the work of Lambert's Point and if there was anything done we done it; and if there was nothing done there was nothing to do. I don't remember whether the Victory was the first steamer that came up or not.

Q. I am not asking you about steamers. You don't re-
(671) member—? A. I am going to tell you what I remember and what I do not.

Q. Do you remember whether or not the Commodore at any time an hour or two before the collision had taken a barge out and anchored her? A. I do not.

Q. Do you remember seeing the barge Storm King out there? A. No, I don't know at that present, but I have seen her out there a great many times.

Q. Do you remember seeing the British steamer Princess there that day? A. No, I don't remember that. Let me ask you one question; what is the use of asking a man so many useless questions of a thing he don't charge his memory with of three years ago?

Q. I am not on the witness stand, and it is your business to answer the questions I ask you, and if you do not I shall

have to ask the court to make you answer them. I understand you to say that you dont remember the Storm King? A. No, sir, not being there that day.

Q. You don't remember the Princess? A. No, sir, not that day.

Q. And you don't remember the Commodore having taken any vessel out within an hour or two before the collision and anchored her? A. No, I don't remember that.

Q. Do you remember whether any vessels were anchored in the western side of that channel off Lambert's Point? A. There were some few anchored there, vessels or barges, I don't remember what they were, whether all barges or all vessels, or part barges and part vessels.

(672) Q. Did you see the helm of the Plymothian being moved or did you judge of the helm from the appearance of the rudder in the water? A. I didn't see him throw his helm over; no, I didn't say that.

Q. I didn't say you said it. How did you judge that he ported his helm? A. Because his rudder was hard-a-starboard, and I judge his wheel was a-port.

Q. How was the tide? A. Flood.

Q. How does it run there? A. Pretty rapidly, from 2½ to 3½ miles an hour, I suppose, sir.

Q. Where was the Victory when you first saw her? A. Below Craney Island when I first saw her.

Q. And how was she then with reference to the channel? A. We were above Craney Island and they were below, and there is a turn between where we were and where they were and I couldn't tell whether she was on the eastern side or the western side.

Q. And I understood you to say when she passed Craney Island she was in mid-channel? A. Yes, sir.

Q. How close did she come to where you were before she commenced to move over to the eastern side of the channel? A. I couldn't tell you that either; I don't remember.

Q. Had she gotten half way between Craney Island and your boat before she commenced to go across? A. I told you I didn't know whether she was half way, a third or three quarters of the way.

Q. Was she closer to you or to Craney Island when she commenced to move to the eastern side of the channel? A. I don't know that either.

(673) Examined by Mr. SHARP:

Q. All the time you had the Victory in view before she moved over, as you say, to the eastern side of the channel, was she in mid-channel? A. Yes, sir.

Q. Never on the western side of the channel? A. No, sir.

Q. You saw her all the time from Craney Island up to the time of the collision, and during that time she was never on the western side of the channel. She was all that time either in mid-channel or the eastern side. A. Yes, sir.

Q. And you saw her pass Craney Island? A. Yes, sir.

Q. And you are sure she didn't pass to the westward of mid-channel in passing there or at no time thereafter? A. No, sir.

Q. Nor from mid-channel over there? A. No, sir.

Q. And you don't know how far she was to the south of Craney Island when she started over there? A. No, sir; I suppose it was when she blew two whistles to the Plymothian.

By Mr. MYNDERSE:

Q. You say when you first saw the Victory she was below Craney Island. You mean to the north of it? A. Yes, sir.

Captain ROBERT C. HENLEY, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. What is your name, age, residence and occupation? A. Robert C. Henley, 35, Norfolk, State pilot.

Q. How long have you been a pilot? A. About 14 years a pilot; 12 years a first-class pilot.

(674) Q. What position do you occupy in your pilot association, if any? A. Well, no particular position; just one of its members.

Q. Have you been elected to any position? A. Yes, sir. I have been elected one of the Board of Pilot Commissioners, but haven't qualified yet.

Q. Your business, of course, is specially in the waters of the Elizabeth river and James river and lower Chesapeake bay? A. Yes, sir; the Virginia waters.

Q. Please state what position you occupied on the steamer Plymothian on the 12th of November, 1891? A. I was pilot of the ship.

Q. Did you bring her in? A. Yes, sir.

Q. For what purpose did she come in? A. For bunker coals.

Q. You had gotten on her at Cape Henry and brought her up to Lambert's Point pier? A. Yes, sir.

Q. And how was she lying at the pier? A. On the north side of the old pier, with her head out.

Q. That is the north side of the north pier, with her head out? A. Yes, sir.

Q. Just state to the court exactly what happened from the time you left the pier up to the time of the collision? A. Well, that afternoon, in the neighborhood of 4 o'clock, they said the ship was ready for sea and the Captain called me and said he would proceed to sea, and he went on the bridge and cleared the whistle, blew the steam out, and I took hold of the whistle after he was through with it and blew one long whistle, and he asked what's that for, and I said to let the vessels above or below us know we were (675) coming out.

Q. That was for coming out of the dock? A. Yes, sir.

Q. Who was on the bridge beside yourself? A. Captain Mardon.

Q. Who was at the wheel, and how was it situated in respect to the bridge? A. Right under the bridge; there is a speaking tube to it, and there is a little hatch-way, and I could see right down upon them.

Q. And two men were at the wheel? A. Yes, sir.

Q. And Captain Mardon was on the bridge and yourself? A. Yes, sir.

Q. And you were acting as pilot of the ship? A. Yes, sir.

Q. Just state what happened after you blew the one whistle when you left the dock? A. I sung out to let go the lines and go ahead slow—before I told the man to port the helm and rang her ahead slow, and I watched her, and he stopped her all of a sudden, and I said what's that for, and he said your stern is swinging into the dock.

Q. Do you mean he stopped the ship or the engines? A. The engines.

Q. You mean the ship was swinging around? A. Yes, sir. He stopped the engines.

Q. When you cleared the pier what was done? A. I said "half speed ahead" with the helm a little to port, and as we came out close to the buoy I said "full speed ahead and hard-a-port."

Q. How with reference to the buoy was your bow at the time you rang full speed ahead? A. Just on the starboard bow.

(676) Q. The buoy was about on a line with the bow? A. Yes, sir, when I rung full speed ahead.

Q. How close did you pass aboard that buoy? A. I should say from 40 to 60 feet. It was a good flood-tide running up and swept the ship's stern right up.

Q. As close aboard as you could get with safety? A. Yes, sir.

Q. What happened then? A. Just as I passed the buoy and straightened up for the channel I sung out "steady,"

and I saw this Victory coming up just ahead a little on the port bow and I blew one whistle just as I passed this black buoy, and after blowing the whistle, after 1 minute I could get no response, I blew another one whistle. I got no response, but he ported his helm so that I could see the whole port side of his ship and the round of his stern, and I went along a few minutes. All at once the captain said "Pilot, what is that fellow doing?" and I blew *on* whistle again and he answered with two, and I immediately blew the danger signals and reversed the ship full speed.

Q. What did he do? A. Came on and came into us.

Q. What should you judge he did with his helm when he gave you the two whistles? A. Starboarded his helm and came right into us. He was on my port bow with his port bow showing to me, and when he starboarded his helm was the time I blew my whistle and he blew two whistles, and I gave the danger signals immediately and reversed the ship.

Q. How far was the Victory off from you then, at the time you reversed your engines, and how far was buoy No. (677) 7? *Q.* Buoy 7 was close aboard of me on my starboard bow.

Q. About how many yards? A. When we first blew the signals?

Q. How far did you get from the time you blew the danger signals up to the collision? A. I should say about 300 feet.

Q. About 100 yards? A. Yes, sir.

Q. How far was the Victory from you at the time you blew your danger signals? A. I should judge she was about 3 to 500 feet.

Q. Was she nearer buoy No. 7 than you were? A. No, sir. I was nearer.

Q. If you were 300 feet from buoy No. 7, how far was she from buoy No. 7? A. How far was she to the west of it?

Q. No, on a north and south line at the time you blew your danger signals? A. She must have been 7 or 800 feet.

Q. If you were 300 feet and she 7 or 800 feet from it, how far was the Victory from you at the time you blew your danger signals? The buoy was between you? A. Yes, sir.

Q. You were 300 feet from it? A. Yes, sir, she was 7 or 800 feet from me.

Q. My question was how far was the Victory from you when you blew the danger signals, and you say 7 or 800 feet? A. 7 or 800 feet off.

Q. What speed had you been making from the time you left the pier, or left buoy 9, we will say, up to the time you reversed you engines? A. Couldn't have been going over 4 knots.

Q. How was the tide? A. A strong flood.

Q. And you only rang for the engines full speed as you got to the buoy? A. Just as the bow crossed the buoy I rang up full speed.

(678) Q. Your vessel was loaded? A. Yes, sir; and then, again, we don't have steam up just as we are leaving the pier—we wouldn't have steam up to full steam.

Q. So that at no time before you blew the danger signals were you moving more than four or four and a half knots? A. No, sir; impossible for the ship to go over that with that class of ship.

Q. At the time the vessels came into collision how was your vessel moving? A. We were stopped; we were dead in the water.

Q. Your headway had been entirely checked? A. Our headway was entirely stopped; we had no headway. If anything, it might have been a little sternway, no headway, and the Victory was coming very fast into us, because I was the one that sung out and asked him if he was going astern with his engines.

Q. At the time he was coming into you, you sung out and asked him if he was going astern with the engines? A. Just after the collision—just at the collision. I jumped off one end of the bridge and the captain off of the other, and I went to the side and asked if he was going astern with his engines.

Q. What speed was the Victory going at the time of the collision? A. At least four knots.

Q. How had she been going before you saw her blow two whistles? A. That's hard for me to judge, being aboard another vessel; but she was coming up very rapidly.

Q. She was a little on your port bow? A. After I straightened the ship down the Victory was on my port bow.

Q. And in that position it was hard to judge the speed (679) of the Victory; but you say she was moving rapidly? A. Yes, sir.

Q. As I understand, you blew your first signal to the Victory just as you were clearing buoy 9? A. Just as I was getting by buoy 9.

Q. How long after that was it, in your judgment, before you blew your second signal? A. Not over a minute. When I got no response I immediately blew the other blast.

Q. You got no response to that second one? A. No, sir.

Q. How long did you proceed before you blew your third signal whistle? A. As I said, when I blew that he gave me no response, but ported his helm and showed me the whole port side of the ship, leading me to suppose he understood.

Q. You blew the second signal and got no response and then saw he was altering his course? A. He ported.

Q. He in the mean time had ported and was showing you the round of his stern? A. Yes, sir.

Q. And you were proceeding port to port and all was clear? A. Yes, sir; all was perfectly clear.

Q. Then it was you saw him alter his course? A. About three minutes after that.

Q. And then you blew your third whistles? A. And got a cross signal from him.

Q. When he was altering his course, then, how was he coming? A. He starboarded a little for me but didn't come up straight for me, and as I saw him altering his course I blew him a signal and he blew two whistles, and I blew the danger signal and reversed the ship.

Q. So, if I have got what you testified right, as I under-
(680) stand, as you passed buoy 9 you gave one signal to the Victory, then a little on your port bow about mid-channel? A. Yes, sir.

Q. And you got no response? A. Yes, sir.

Q. And about a minute after you blew a second whistle? A. Yes, sir.

Q. And got no response to that, but saw him altering his course a little to the westward so that he showed the round of the stern? A. Yes, sir.

Q. And you proceeded, and in a little while noticed he was altering his course towards you? A. Yes, sir.

Q. He then signalled with a cross signal of two blasts, altering his course very perceptibly, and then it was you blew your danger signals and reversed the ship? A. Yes, sir.

Q. You never heard anything from the Victory except the signals of two blasts and the danger signal? A. That's the only whistles, sir, he blew the danger signal after I blew it. The Plymothian had a very distinct whistle for that class of ship.

Q. How did it compare with the Victory's? A. Far superior.

Q. As I understand, the English ships haven't good whistles? A. Exceedingly poor whistles.

Q. But for an English steamer how did you regard the Plymothian's whistle? A. Very good.

Q. You say the Captain took the precaution to blow his whistle out before he got under way? A. Yes, sir.

Q. And then you blew it yourself? A. Before I left the dock I blew it myself, because he asked me what was that whistle blown for.

(681) Q. Did you notice the tug "Pioneer" in the river as you were leaving the dock? A. Yes, sir.

Q. About where did you pass her? A. As I was on the outside, to the west of the buoy, he was just to the east of it.

Q. Buoy No. 9? A. Yes, sir.

Q. What was done? A. The Captain saluted him, gave him three whistles as we were going by.

Q. Captain Mardon? A. Yes, sir, three short blasts of the whistle.

Q. As I understand from the time you left the dock, the Plymothian blew one whistle, then blew three to the Pioneer, then you blew three separate blasts of your whistle as a signal to the Victory, and then three again as a danger signal? A. Yes, sir, and he blew danger signals a little after I blew myself.

Q. You heard the Plymothian blow all those several times? A. Yes, sir.

Q. Those whistles were clear and distinct? A. Yes, sir.

Q. When you first saw the Victory you say she was in mid-channel about Craney Island? Yes, sir.

Q. Now you say she proceeded about mid-channel, and at one time was directing her course a little to the westward? A. Yes sir.

Q. Up to the time you blew the third of your signal whistles, and then it was you saw her altering her course to come over to the eastern side of the channel? A. Yes, sir.

Q. Did you notice any vessels down the river ahead of (682) you, and between you and the Victory? A. Not between us.

Q. At the time of the collision did you notice any vessels in that vicinity? A. After the collision I noticed a schooner on our port side—to the west of us.

Q. How far was she off? A. About a hundred feet, I judge.

Q. About 100 feet from you? A. Yes, sir; a schooner bound down,

Q. That was after the collision? A. Yes, sir.

Q. At the collision your engines were stopped? A. Yes, sir. At the collision?

Q. At the collision they were going astern? A. Yes, sir.

Q. And did the vessels part from each other? As I understand, your vessel had checked her headway, and if any-

thing, had stern way on her? A. Yes, sir, dead in the water.

Q. With the engines astern? A. Yes, sir.

Q. And the Victory came into you, you think, at the rate of four or five knots? A. Yes, sir.

Q. How did the vessels clear each other? A. He kept on backing and the flood tide cut me away, the stern swung around towards each other, and he cleared us; as he backed I went full speed ahead and put the ship ashore in shallow water.

Q. Did you see buoy No. 7 at the time of the collision or immediately after the collision? A. Yes, sir.

Q. Describe how that buoy was in respect to your ship? A. It was on my starboard bow just before the collision, and after the collision it came out just on my port bow.

Q. You were making stern way? A. Yes, sir, and the tide was cutting the vessel around.

(683) Q. And it was after the collision that you saw this schooner out in the channel? A. Yes, sir; a schooner bound down the river.

Q. If that schooner had interfered with the navigation of either of those vessels, which one would it have interfered with most seriously? A. Interfered with my vessel most seriously.

Q. She was going down in the same direction you were? A. Yes, sir, and she was on the east of the middle of the channel. The schooner was bound down.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You say when you passed from Lambert's Point you passed close to No. 9 buoy? A. Yes, sir.

Q. And within 40 feet? A. From 40 to 60 feet.

Q. Having the buoy to the east or north of you at that time? A. To the east of me.

Q. The buoy was then to the east of you at that time. At that moment where was the Victory? A. Coming up somewhere just below Craney Island light.

Q. She had passed Craney Island light? A. No, sir.

Q. Hadn't passed Craney Island light? A. No, sir.

Q In going down the river which side did you go on? A. I *taken* the eastern side, sir.

Q. How close to the bank did you say? A. From the line of the buoys? 40 to 60 feet.

Q. That is from buoy No. 9 to buoy No. No. 7, where the collision occurred? A. Yes, sir.

(684) Q. That was your line, keeping as close as 40 to 60 feet of the line of the buoys? A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. Then you were never in the mid-channel going down? A. I was never in the mid-channel; no, sir.

Q. Then you say the Victory ported her helm and kept under a port helm about three minutes after the second whistle? A. I say she ported her helm and showed me her port side.

Q. What did you mean by the word "three minutes" at that time? A. I said that was the time from the time I blew my second whistle until I blew my third.

Q. You mean it was three minutes between the two whistles? A. Yes, sir, between the third and second.

Q. You gave a second one? A. Yes, sir, about a minute afterwards.

Q. And you were then close to the eastern bank? A. Yes, sir.

Q. And then about three minutes afterwards— A. Yes, sir.

Q. Therefore, there was an interval of about three minutes between your second and third whistles? A. Yes, sir.

Q. And during that time the Victory ported her helm. Where was she at the time she ported her helm? A. Just turning the light-house and ported her helm to haul on her course.

Q. She had passed the light-house? A. Just passing the light-house and hauled up on her course.

Q. She was porting her helm at the light-house just before you blew your third whistle? A. Starboarded when I blew the third.

(685) Q. When did she port her helm, after you blew your second whistle? A. After I blew the second whistle she ported her helm, or as I blew the second whistle.

Q. You mean at the time you blew the second whistle she ported her helm? A. Yes, sir.

Q. And at that time she was abreast of Craney Island? A. Abreast of it, or a little above, if anything.

Q. And where was she in respect to the channel then? A. I judge she was coming up in mid-channel.

Q. And at that time she ported her helm. How long did she stay under a port helm? A. She steadied her helm after she cleared the light.

Q. Can you form an estimate? A. Couldn't have been under it more than a half a minute or a minute. The ship slewed.

Q. Then you say she was under a port helm half a minute off Craney Island light-house? A. I can't say he ported his helm half a minute; she had her bow on a south by east course.

Q. After she passed Craney Island light-house she ported her helm and stayed under port helm half a minute? A. Yes sir.

Q. And was then in mid-channel? A. Yes, sir.

Q. And proceeded half a minute and starboarded? A. Steadied.

Q. And kept down what side? A. Kept up the mid-channel.

Q. How long did she proceed that way? A. Kept up—

W. How long did she proceed? A. I don't know, sir; I couldn't tell how long she proceeded up on that.

Q. Can't you form some idea? A. No, sir, she was going at a rapid rate of speed.

(686) Q. How far was she from Craney Island when she starboarded her helm? A. About half way, possibly, from Craney Island to the buoy.

Q. And kept on rapidly you say towards that buoy under a starboard helm? A. She kept on after me. I was above the buoy, and she headed for me, not directly for the buoy.

Q. She was heading, then, right for you? A. Yes, sir.

Q. Under a starboard helm? A. Yes, sir.

Q. And at that time you were hugging the bank on the eastern side? A. Yes, sir.

Q. And what did you do with your helm? A. This time I blew him that whistle when he starboarded.

Q. He didn't port? A. I ported a little.

Q. Didn't put it hard-a-port? A. Not until I seen a collision was coming.

Q. How far to the west of the buoy was it at the time of the collision? A. Close aboard of it.

Q. How far were you from it? A. I should judge 25 feet.

Q. And you were about 40 to 60 feet when you were off buoy 9? A. Yes, sir.

Q. You kept along as close as that all the way down? A. Yes, sir.

Q. And you put your helm hard-a-port just before the collision? A. Yes, sir.

Q. And under that port helm you didn't run ashore? A. No, sir; because I was checking my headway all the time.

Q. Didn't putting the helm hard-a-port put her head to the right? A. Yes, sir.

(687) Q. And she was 20 feet from the bank, and didn't go ashore? A. 40 feet I said, sir. Ships don't go ashore until they are inside the line of the buoys.

Examined by Mr. ROBERT HUGHES.

Q. Where was the Victory when you first saw her? A.

Below Craney Island light when I first saw her. That was when I was lying alongside the pier.

Q. Where was the Victory when you got even with buoy 9? A. Turning by Craney Island light.

Q. And I understood you to say she was then in mid-channel? A. Yes, sir; as far as I could judge from the distance I was; she was about ship-channel—mid-channel.

Q. Did she continue in mid-channel up to the time she crossed signals with you? A. She was starboarding a little, starboarded her helm before she crossed my signal.

Q. Then up to the time of starboarding her helm she continued from Craney Island up to that point about in mid-channel? A. As near as I can judge, yes, sir.

Q. How far was she from you at that time? A. Well, I should say she was 7, 8 or 900 feet from us at that time.

Q. And at the moment when she commenced to starboard she was in mid-channel? A. Yes, sir.

Q. And had been in mid-channel as near as you could judge in passing Craney Island? A. As near as I could judge.

Q. But previous to that she had ported? A. Yes, sir; showed me her whole port side and the round of her stern.

(688) Q And although she was in mid-channel at Craney Island at this time, she had previously ported? A. She had ported for me.

Q. And in mid-channel? A. Yes, sir.

Q. She was in mid-channel then when she ported and stayed in mid-channel after she ported? A. No; she went to the west of mid-channel a little when she ported.

Q. Didn't continue to come all the way up in mid-channel? A. In my judgment she was in mid-channel. Two ships can pass in mid-channel.

Q. What is the course from Boush's Bluff light-ship to Craney Island light? A. Somewheres east of south and then the next course is southwesterly. When you haul up by the light-house it is southwesterly. The first course is southeasterly and the next course is southwesterly.

Q. Now is it a straight course from Craney Island to buoy 9 deep water channel? A. We don't haul that way, sir; we haul right up the channel; that is not the channel.

Q. Doesn't buoy 9 mark the eastern line of the channel? A. Yes, sir.

Q. Isn't it a straight course from Craney Island up to the channel opposite Lambert's Point light-house? A. Yes, sir, abreast of the light-house, but not to the light-house.

Q. Would the line of mid-channel from a point opposite Craney Island light to a point opposite Lambert's Point

light be a straight line or not? A. Yes, sir, be a straight line to a point abreast of Lambert's Point light, but not to the light itself.

(689) Q. Of course, not to the light itself. In coming out that day, as I understand you to testify, buoy No. 9, when you gave the first whistle, was off your bow? A. When I gave my first whistle to the Victory?

Q. Yes. A. It wasn't off my bow; I was passing the buoy with the buoy on my starboard side.

Q. How far off? A. From 40 to 60 feet to the east of me, not to the north, to the east.

Q. How was your helm coming from the light-house to the buoy? A. A little to port.

Q. How many points to port? A. She had four or five spokes of the helm to port.

Q. You came out under that helm, and when you got even with buoy No. 9 how did you put your helm? A. As I drew up close to the buoy I put the helm hard-a-port and the ship was running full speed ahead then.

Q. At that point you put your helm hard-a-port? A. Yes, sir.

Q. How much did you have to move it to get it from slightly a-port to hard-a-port? A. The wheel had to revolve several times.

Q. How long did you keep your helm hard-a-port? A. Until the ship came straight down the channel.

Q. What did you do then? A. Steadied my helm.

Q. How did you do that? A. Sung out steady.

Q. How did the helmsman do it then? A. They threw the wheel the other way.

Q. How much? A. Probably half a dozen or more turns to steady the ship.

(690) Q. To steady a ship from hard-a-port to amidships takes as many turns as porting it will take or further? A. Yes, sir; take a little more to catch her exactly.

Q. Had you brought the Plymothian in that morning? A. Yes, sir.

Q. What was her draft? A. I don't recollect; she was a light draft ship.

Q. Was she loaded? A. Yes, sir.

Q. What did she come in for? A. Bunker coal.

Q. Did she take on bunker coals? A. Yes, sir.

Q. What was her draft going out? A. I don't recollect her draft going out.

Q. You were the only pilot she had? A. Yes, sir.

Q. And you don't recollect her draft coming in or going out? A. No, sir; I didn't pay any attention to it. The coal people keep a record of it.

Q. What do you call a light draft ship? A. 15 or 16 feet; possibly she might have drawn 16½ feet. She was a light draft ship.

Q. Do you remember what the pilot bill was? A. No, sir; I have no business making out pilot bills. I only receipt them.

Q. When you come into the harbor don't you report the draft of the ship so they can make out the bill? A. That is done down at Lambert's Point. The clerk does that.

Q. Isn't there a record here? A. No, sir.

Q. Who is it paid by? A. William Lamb & Co.

Q. To whom? A. The office.

Q. Where? A. In Norfolk.

(691) Q. You don't take a— A. When a vessel goes out they give us a due bill, due the Pilot Association so much.

Q. That bill is on file here? A. I don't know.

Q. Can you go to the pilot office here and let us know what the draft of the vessel was? A. No, sir; it would take the finest mathematician in the world.

Q. How much do you get? A. Half pilotage on a ship coming in for bunker coals, $4.50 or $2.50. $2.50 would be $1.25 on her; but if I recollect she drew somewhere between 14 and 16 feet, that would make it about $2 a foot.

Q. Do you know some way that you can find out? A. The only way is to find out from William Lamb & Co.; but she was a light draft ship.

Q. What was her length? A. Somewhere in the neighborhood of 2 or 300 feet.

Q. Smaller than the Victory? A. Considerably smaller than the Victory.

Q. What is the length of the Victory? A. 300 feet—somewhere in that neighborhood.

Q. And the Plymothian under that? A. Yes, sir.

Q. Somewhere in the neighborhood of 250? A. Somewhere, I should judge. She is a small tramp ship and the Victory is the average size.

Q. Which do you think draws the most, the Victory light or the Plymothian loaded? A. A cotton cargo in the Plymothian would be lighter than the Victory.

Q. You think the Plymothian with cotton aboard drew less than the Victory coming in light? A. Yes, sir.

Q. I understand this schooner, you say, was going down (692) the river? A. That was after the collision.

Q. You didn't see any before the collision? A. I didn't notice any before the collision; a schooner above me possibly; the same schooner was coming down the river.

Q. Did you notice any schooner in the river between you

and the Victory before the collision? A. No, sir, I did not.

Q. But you say if she had been there she would have interfered more with you than with the Victory? A If the schooner had been there and on the eastern side of the channel she most assuredly would, sir.

Q. If you had passed that schooner you would have overhauled her wouldn't you? A. Yes, sir, if she was ahead of me going down.

Q. If the Victory had tried to pass that schooner, supposing the Victory to be on the eastern side of the channel, she would have had to pass across her bows? A. If the Victory had been on the eastern side and the schooner on the eastern side and she had ported her helm, she would have had to cross her bows.

Q. And you think it easier to pass across a schooner's bows than across her stern? A. No, sir, but you had the ships in a different position from what you have just put them in, sir.

Q. How far apart were the vessels when you reversed? A. 7 or 800 feet I should judge.

Q. And how long before the collision was it when you reversed? A. About three to four minutes, I should judge, sir. I didn't take any time about that time.

Q. You judge about three or four minutes with your engines reversed, and that when you commenced that move-
(693) ment the vessels were 7 or 800 feet apart? A. Yes, sir.

Q. And you think the Victory at the time of collision was moving about how many knots an hour? A. About 4 when she came into me, it looked like, sir. That's the reason I asked the question, she came into me so fast.

Q. Previous to reversing your ship had been moving under your engines full speed for several minutes? A. Yes, sir.

Q. And of course she had some headway? A. Yes, sir.

Q. Of course your ship didn't stop right still in the water the minute you reversed your engines? A. No, sir.

Q. She still forged ahead for some time afterwards? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. Pilot as I understand it, you blew three single whistles as signals? A. Yes, sir.

Q. The first to indicate that you were going down the eastern side of the channel? A. Yes, sir.

Q. And the second one was a repetition of that? A. Yes, sir.

Q. It was after blowing that second one that you saw the Victory port a little so as to show her port slde? A. A little more, yes, sir.

Q. And that porting was an incident to the course of the channel; if he followed the channel he would naturally port a little at the bend where she was? A. Yes, sir.

Q. At the same time it tended to accord with the movement which you had started? A. Yes, sir.

Q. But after a little you saw she had steadied and was (694) starboarding? A. Yes, sir.

Q. And you blew the third signal? A. Yes, sir, and she answered with a signal of two.

Q. And you blew the danger signal, and she blew the danger signal shortly after? A. Yes, sir.

Q. That is a history of the signals? A. Yes, sir.

Q. Why did you take the eastern side? A. That is the proper side of a man to take if it is clear, to take that side.

Q. And coming up vessels take the western side? A. Yes, sir.

Q. That's the regular course of navigation in all channels? A. Yes, sir.

Q. Each vessel takes the starboard side? A. Yes, sir.

By Mr. FLOYD HUGHES:

Q. Even if the starboard side makes them take a little longer course than to take the other course? A. Yes, sir.

Court at 3:50 P. M. adjourned until to-morrow, Saturday, April 21st, 1894, at 11 A. M.

At 11 A. M. on Saturday, April 21st, 1894, court reassembled, and CAPTAIN CALEB GOODWIN, a witness for the Plymothian, sworn.

By Mr. FLOYD HUGHES:

Q. State your name, age, residence, and occupation? A. Caleb Goodwin; 34; Portsmouth; steamboating.

Q. In what tug are you now and in what capacity? A. Master of the Katie.

(695) Q. What were you in November, 1891? A. Master of the Commodore.

Q. She was a tug employed around Lambert's Point? A. Yes, sir.

Q. You of course have a license? A. Yes, sir.

Q. How long have you been following the water? A. Somewheres about 18 or 19 years.

Q. How long have you been master? A. A little over 12 years.

Q. Whereabouts is your chief business? A. Down at Lambert's Point coal piers.

Q. How long have you been working around there in these tugs? A. Ever since the pier was built.

Q. Are you or not acquainted with the channel of the river in that vicinity? A. Yes, sir.

Q. On the 12th of November, '91, the day on which the collision happened between the Plymothian and Victory, where were you? A. I was right out in the river.

Q. On board the Commodore? A. On board the Commodore.

Q. And in command of her? A. Yes, sir.

Q. Did you see the Plymothian leave the coal pier? A. Yes, sir.

Q. How was she heading before she left, with her bows in or out? A. Bows out.

Q. On which side of which pier? A. The north side of the old pier, No. 1 pier.

Q. Did you see her move out? A. Yes, sir.

Q. Sust describe her movement, Captain, with respect to (696) what she did in moving down the river towards the scene of the collision? A. Well, when he came out of the dock he came slow, and leaving the dock he blowed one long whistle.

Q. That's the usual whistle? A. The usual whistle coming out of a dock.

Q. How did his helm appear to be? A. As soon as he got clear of the dock he put his helm hard-a-port.

Q. You don't know how he put his helm; you only judged from the way the vessel turned, I imagine? A. He put his helm hard-a-port.

Q. Did you see him pass that buoy, which was then No. 9? A. Yes, sir.

Q. How close did he come to it, and on which side? A. Well, he was on the westward side of it, I should judge about, well, not over 50 yards.

Q. And possibly less? A. Possibly less.

Q. How did he direct his course then; down the eastern side, the middle of the channel or the western side? A. Held right *right* down on the eastern side of the channel.

Q. How did you hear any other whistles? A. I heard him blow just as soon as he hauled around the buoy and straightened up—he blew one whistle. Of course, that was to the Victory.

Q. Did you see the Victory coming up the river? A. Yes, sir.

Q. About where was she then? A. Somewheres about a little to the south of Craney Island light.

Q. Just past Craney Island light? A. Yes, sir.

Q. Did you see or hear anything from the Victory? A. (697) I saw the steam of two whistles, but never heard the whistles.

Q. You heard the puffs of steam from the whistle, but never heard the sound? A. Never heard the sound at all.

Q. What did the Plymothian do? A. Then a little while after that, I suppose two or three seconds, he blew the one whistle again.

Q. After you saw the steam issue from the Victory's whistle, a few seconds after that, you saw the Plymothian blow another whistle? A. Yes, sir.

Q. Where was she then? A. On the eastern side of the channel.

Q. How close aboard was he to you then? A I was on the western side of the channel.

Q. How far off? A. Well, I was pretty well over on the western side.

Q. Well, were you nearer the middle line of the channel or the western shore? A. Nearer to the western shore, about half way between the Plymothian and the western shore, but I was closer on the western shore, because I was making a circle over there to turn around.

Q. What was your object in the river at that time? A. I went out to meet the Victory.

Q. You were making a turn to go down and meet the Victory? A. Yes, sir.

Q. The Plymothian then blew one blast? A. Yes, sir, one.

Q. What did the Victory do then? A. The Victory blew two; I heard those.

(698) Q. Those were the first sounds you had heard from the Victory? A. Yes, sir.

Q. Well, what did the Plymothian do after the Victory blew those blasts that you heard? A. Well, now, he blew as near as I can remember three or four short blasts.

Q. Those were the danger blasts? A. Yes, sir.

Q. What did he do upon blowing them? A. Reversed his engines astern.

Q. He was then on the eastern side of the channel? A. Yes, sir.

Q. At what speed was he going before he threw his engines back? A. He wasn't going, I don't think, not over 4 miles an hour; because he hadn't gotten full headway on the ship.

Q. The distance was too short to have gotten full headway on the ship? A. Yes, sir.

Q. Well, how long did those engines move astern? A. I will tell you, Mr. Hughes, the nearest I can come at it the Plymothian was stopped altogether, lying perfectly still.

Q. At the time of the collision? A. Yes, sir.

Q. At the time of the collision how were the engines going—how was the propeller going? A. That I don't remember now, but I think she was backing. That's only the thinking part now: I am not sure.

Q. You think that she continued to back her engines up to the time of the collision? A. I think he did; I am not sure about that; it has been too long.

Q. You are certain, however, that his headway was entirely checked? A. Yes, sir.

(699) Q. How close to buoy 7 did the collision occur? A. I don't think there was over 200 feet.

Q. Not over 200 feet? A. I don't think over that; she was pretty close on to it.

Q. About how far were you from the vessels when they came together? A. I suppose I was about 50 or 75 yards.

Q. You had been proceeding down the river to meet the Victory. A. Yes, sir.

Q. You were 50 or 75 yards from them when they came together? A. As soon as I seen them coming together I went ahead on my boat and went over there. I judge I was 50 or 60 or 75 yards from them. As soon as I seen them coming together I went up to them; I thought I might do some good.

Q. You afterwards did render assistance to the Plymothian, didn't you? A. I don't remember, but I think I took an anchor for him. I am not sure, but I think I did.

Q. After the Victory blew her two blasts that you heard, how did she direct her course? A. He kept right straight ahead; it looked to me like he starboarded his helm.

Q. How was he in respect to the channel when he passed Craney Island; was he in the middle or on the east or west side? A. He was on the west side.

Q. When he blew the first time, the blasts you didn't hear, how was he? A. On the west side.

Q. How was he when he blew the second blasts of two whistles? A. Coming up then about middle way.

Q. Directing his course to port under a starboard helm? A. Yes, sir.

(700) Q. Then he kept straight ahead to the scene of the collision at buoy No. 7? A. Yes, sir.

Q. That's on the eastern edge of the ship channel? A. Yes, sir.

Q. Now state as to the speed of the Victory? A. I should judge she was coming up at about 10 miles an hour

Q. Making a good speed past Craney Island? A. Yes, sir; had a flood tide.

Q. The tide was flood, you say? A. Yes, sir.

Q. How was it running, strong or just backing up? A. I guess about half tide.

Q. You have testified that you heard the whistles of the Plymothian several times? A. Yes, sir.

Q. Just describe how these whistles were in respect to being clear and distinct? A. The Plymothian's whistles were clear and distinct.

Q. How were they compared to the Victory, as good or better or worse? A. That I can't tell you; you see the trouble about these steamers, when they go some time and don't blow their whistles, the pipes get water in them, and probably the Victory hadn't blowed her whistle that day or for three or four hours, and the Plymothian when she came out of the dock he blowed his whistle, the dock whistle, and that cleared his whistle. His might have been the same way if he had laid some time and did not blow it.

Q. But when he blew them again down the river they were clear and distinct, and you heard them? A. Yes, sir. (701) Q. You say you were near the scene of the collision when the vessels came together? A. Yes, sir.

Q. Did you notice any vessels in the vicinity of the collision? A. I remember one boat being there in the river, but I think it was the Virginia Dare, if I am not mistaken.

Q. She was a river steamer that plies between here and Suffolk? A. Yes, sir; I think it was the Virginia Dare, either going or coming. I don't remember, but there was plenty of room.

Q. You don't remember whether he passed the Victory or Plymothian? A. I don't know which one he passed—don't remember which way he was going.

Q. You saw the Plymothian moving out under a port helm and down to the scene of the collision? A. Yes, sir.

Q. And you have testified that she passed near buoy 9 and kept on the eastern side of the channel? A. Yes, sir.

Q. You have no doubt on that point, captain? A. No doubt; no, sir, on that part of it at all. I seen it right there.

Q. Nor have you any doubt as to having heard these whistles of the Plymothian, and they were clear and distinct? A. No doubt about it at all. If you had had this thing up some time ago I would have had it fresh in my mind, but Mr. Hughes told me they were not going to have it here and I let the thing drop. I can keep a thing in remembrance a long time if I know I have got to do it.

CROSS-EXAMINATION.

By Mr. SHARP:

Q. You say that you know the fact that the Plymothian

(702) put her helm hard-a-port as she left the pier? A. Yes, sir.

Q. You saw that? A. Yes, sir.

Q. Some time has elapsed, you remark, which impairs the memory, but of that fact you have no doubt? A. No doubt at all.

Q. You say she put her helm hard-a-port as she left the dock? A. Yes, sir.

Q. Before she reached buoy 9? A. Yes, sir.

Q. Just as she left the pier? A. Yes, sir.

Q. Where was the Victory when you say she starboarded her helm—appeared to starboard her helm? A. A little to the south of Craney Island light.

Q. How far to the south? A. Distance is very funny on the water.

Q. Was she 100 yards? A. I think she was 100 yards to the south of the light-house.

Q. Then she starboarded her helm? A. Well, it appeared so to me.

Q. Did she port her helm? A. No, sir; if she did I didn't see it.

Q. Did you keep your eye well upon the Victory? A. Yes, sir.

Q. Know what she did? A. Yes, sir.

Q. And you were coming down the stream to meet her? A. Yes, sir.

Q. And looking ahead? A. Looking ahead.

Q. And didn't see her port but did see her starboard? A. No, I said it appeared she sheered to starboard. It seems as though his wheel was put to starboard and he went across.

Q. It looked to you as if she was starboarded? A. Yes, sir.

(703) Q. But you don't say she starboarded? A. She went to port.

Q. Did you at any time after that time see her helm to the starboard? A. No, sir, but she did sheer to the port.

Q. But that was the time just after she passed Craney Island? A. Yes, sir.

Q. But at no time did you see her port her helm? A. No, sir, I didn't see him port his helm.

Q. At no time did you see him as if under a port helm? A. No, sir.

Q. Do you believe at any time he was under a port helm? A. No, sir, I do not.

Q. Could you have told if he had been? A. I should think so.

Q. You were near enough to see? A. Yes, sir; she ought to have sheered if she was under a port helm.

Q. Q. Did you see that sheering? A. She sheered to port. That's the reason I thought his helm was to starboard.

Q. You saw no appearance of her being under a port helm from the time she left Craney Island? A. No, sir.

Q. Could it have escaped you if she had done it? A. Would it have escaped—

Q. Your notice? A. Yes, sir.

Q. Why? A. Because she would have went clear of the other ship.

Q. Could you have failed to have seen her under a port helm, or sheering that way if she had been under a port (704) helm? A. Yes, sir, I could have seen if she sheered or not.

Q. Then you would have seen it if she was under a port helm? A. Yes, sir.

Q. And you say she didn't appear to be moving under a port helm after leaving Craney Island? A. No, sir; moving under a starboard helm.

Q. Do you believe she was moving under a port helm? A. No, sir.

Q. You said you didn't know he was going under a starboard helm, but she had that appearance after leaving Craney Island? A. Yes, sir.

Q. And at a distance of 100 yards and not more from Craney Island? A. Yes, sir.

Q. You say the Plymothian blew first one blast to the Victory? A. Yes, sir.

Q. Where was the Victory then? A. South of Craney Island light.

Q. Then to the south of Craney Island light? A. Yes, sir; very little to the south, though.

Q. Had she then made this movement as if under a starboard helm then? A. No, sir; coming right straight then.

Q. It was immediately before that? A. Well, just after the Plymothian blew her first one whistle it seems as though the Victory put his wheel to starboard.

Q. I want to know about the time, and I say was that when she was abreast of Craney Island or 100 yards south of it? A. I think he was 100 yards this side of it.

(705) Q. 100 yards this side of it when the first whistle was blown? A. I was a good distance from him; I couldn't tell exactly.

Q. You are speaking as a matter of judgment, and you say at the time the Plymothian blew her first whistle the Victory was, as far as you now judge and believe, 100 yards to the south of Craney Isfand? A. Yes, sir.

Q. And when she blew the second whistle where was the

Victory? A. It wasn't but a very few seconds before she blew the second.

Q. Three seconds between the first and second whistle? A. Three or four seconds I should judge.

Q. And you have stated the next time she blew she blew three or four whistles at once? A. The Plymothian did.

Q. You didn't hear the third whistle from the Plymothan then? A. No, sir; only heard the second.

Q. You heard the first and second and didn't hear the third? A. I never heard but two.

Q. And the next you heard was the danger signal? A. That's all.

Examined by Mr. ROBERT HUGHES:

Q. I understand you were in command of the Commodore? A. Yes, sir.

Q. What were you engaged in just before you started down the river to meet the Victory? A. Lying there at the dock; tied up at the dock.

Q Did you go from the dock right down the river to meet the Victory? A. I think I left the dock and went right down.

(706) Q. Had you at any time before that time taken a barge or vessel out and anchored her? A. Well, I think I pulled a barge out before that; I don't remember how long, though.

Q. What barge was it? A. I think it was the Storm King.

Q. You had taken the barge Storm King out before you started down? A. Yes, sir.

Q. You don't remmember how long before? A. No, sir, I don't remember.

Q. Where did you put the Storm King? A. Anchored her on the western side of the channel.

Q. What do you mean by the western side exactly? A. well, right over abreast of the coal pier, a little to the northwest of the coal pier, on the western side of the channel.

Q. And about how far from the western line of the deep water channel did you anchor the Storm King? A. She was pretty close on the western side of the deep water channel. You see them barges draw a good bit of water, and you have to anchor them in deep water.

Q. You say on which side? A. The western side.

Q. Did she put out an anchor at both ends? A. No, sir, only one anchor.

Q. And she drew a good deal of water? A. Yes, sir.

Q. And still you anchored her close to the western side? A. Yes, sir.

Q. And you wouldn't say she would swing ashore then? A. No, sir.

Q. When you anchor deeply laden barges how much room do you allow them to swing? A. Allow them about 30 fathoms of chain.

(707) What is the length of those barges? A. Some of them are 200 feet, I judge.

Q. Then when they swing to the west you have to allow for the 200 feet length of the barge and 180 feet of the chain haven't you? A. Yes, sir.

Q. Then haven't you got to anchor them at least 380 feet from the western bank? A. We don't always do that. You see on the western side of the channel where we anchor these barges it is right up and down.

Q. Then don't that make it more necessary to anchor them further from the bank? A. No, sir, if they swing there they don't stick.

Q. Don't you anchor them at least 200 feet to 250 feet from the western edge of the channel? A. I guess we do, all of that, probably a little further. We have got to allow for them swinging.

Q. When you anchored the Storm King how far from the western bank did you anchor her? A. That I can't tell now, but I always anchor them on the western side.

Q. You were thinking a little while ago, can't you do some now? How far do you think you anchored the Storm King from the western side of the channel? A. I anchored her, I should judge, about half the distance between the middle of the channel and the western edge of the channel. When it comes down to feet, you know, Mr. Hughes, it is pretty hard to get at.

Q. I understand that. Do you remember any other vessels anchored off about there at that time from buoy 22 to buoy 24? A. No, sir, I do not.

(708) Q. Don't you remember the British steamer Princess? A. No, sir.

Q. Isn't it always the case that at that season of the year there are right many vessels anchored along in that bight? A. Yes, sir; but I don't remember the names of them.

Q. But you remember the fact there were vessels anchored in there? A. I think there were vessels anchored along there. I am sure there were some anchored there, but I don't remember what they were.

Q. And if any of them were deeply laden barges or British steamers they must have been anchored far enough out to allow them to swing clear of the western bank on the turn of the tide? A. Yes, sir.

Q. And that is your practice? A. Yes, sir.

Q. And that is the usual practice when vessels are anchored along there? A. Yes, sir.

Q. Now, as I understand, after anchoring the Storm King you went back to the wharf? A. Yes, sir.

Q. Didn't start from the Storm King right down? A. No, sir.

Q. And then you started down to meet the Victory? A. Yes, sir.

Q. Had you seen the Victory before you started from the pier? A. Yes, sir; as near as I can come at it. When we see a steamer coming up to the pier we always go to the pier to see where they want her at—which berth. We do that right along, and then we go out to meet the steamers.

Q. After anchoring this Storm King you went to the pier to find out which berth they wanted this steamer to
(709) come in? A. Yes, sir, as near as I can recollect.

Q. Now, as near as you can recollect, you were out in the river and saw the Victory coming up and went to the pier to find out where they wanted her in case she came to the pier? A. Yes, sir.

Q. Where were you when you first saw the Victory? A. I was either— I don't remember; up there somewheres. I don't know whether I was out in the river or at the coal pier; but I saw her way down at Sewell's Point half an hour before she got up there—way down below.

Q. And at that time had she turned into the Elizabeth river channel? Would you have bothered about a vessel in Hampton Roads? A. Yes, sir; she was heading up.

Q. Had she gotten up anywhere near Boush's Bluff lightship at that time? A. No, sir.

Q. She was south of Sewell's Point? A. She was down about Sewell's Point.

Q. And south of it? A. I can't tell whether she was south of it or north of it; but I seen her when she was in the Roads. When they come in the Roads they go this way to Newport News and come this way to Lambert's Point. It makes quite a difference.

Q. While on such a course didn't you see she was coming up the Elizabeth river channel and not up Hampton Roads? A. Yes, sir.

Q. And you went to the pier to find out— A. Yes, sir.

Q. Had the Plymothian started out then? A. No, sir.

Q. And you went to the pier to find out, and started out.
(710) Where was your tug when the Plymothian started out? A. I came right along behind him. I left the pier right behind him.

Q. You came out behind the Plymothian? A. Yes, sir.

Q. Pretty close behind him? A. Stayed over on the west side of him.

Q. Then of course you were in a good position to see his rudder and hear his whistle? A. Right close by him. I stayed on the west of him and he stayed on the east side.

Q. And you were just in about as good a position as anybody not on the ship itself, to know about those two things? A. Yes, sir.

Q. Now, as I understand, the first whistle you heard was the dock whistle? A. Yes, sir.

Q. That was the first whistle you heard from the Plymothian? A. Yes, sir, one whistle.

Q. Didn't hear him blow his throttle valve at all before that? A. No, sir, I don't remember it.

Q. You don't remember his blowing before that? A. No, sir.

Q. What was the first noise you heard from the throttle v*lav*e of the Plymothian? A. I think he blew three whistles to the Pioneer.

Q. That was the second? A. That was the second. That was before he got turned good.

Q. That was before he got clear of the wharf good? A. I mean before he got around the buoy. I am not sure about that part of it.

(711) Q. Anyhow you heard those whistles? A. Yes, sir.

Q. You said he headed to the northwest coming out of the pier? A. Well, about west; the piers run about west. Just as soon as he got clear of the pier he put the wheel right hard-a-port and came right down the channel. The Plymothian was a small ship and a short ship and turned very quick.

Q. What do you call a short ship? A. She was short to some of them; I don't think that ship was over 250 feet long; of course you may know the length of her, but I don't think she's over 250 feet.

Q. That's a very good estimate? A. That's a very short ship for that class.

Q. She came out and blew those dock whistles and the next you heard you think was a salute to the Pioneer? A. Yes, sir.

Q. And the next you heard was a whistle to the Victory? A. One whistle, yes, sir.

Q. Where was she when she blew that whistle, and where were you? A. I was still on the western side of her, on the west side of the channel.

Q. And where was she? A. On the eastern side.

Q. How did she bear from the buoy then? A. I think

he was bearing about northwest from the buoy—just after he got around the buoy and straightened up.

Q. Do you mean his bow or his stern bore northwest from the buoy? A. The whole ship.

Q. At that distance there would be some difference in the bearing of the bow and stern from the buoy? A. Not much.

Q. A ship 250 feet long? A. When I say northwest I mean the bulk of the ship.

(712) Q. How close did he pass to that buoy? A. I don't think he was over a length from the buoy.

Q. She passed about a length from the buoy you think? A. I don't think he was over a length, if that.

Q. Give us your judgment of it. You were right there? A. I don't think he was over a length from it.

Q. What do you mean by not over a length? Do you mean about a length? A. I mean about a length.

Q. You think he passed about 250 feet from the buoy? A. Yes, sir, he wasn't over that.

Q. What do you mean by "not over"? If he passed over a foot, he wasn't over it. Do you mean a foot or 250 feet? A. I mean not over 250 feet; probably might have been less.

Q. How much less? A. Probably not over 200 feet

Q. Do you think he passed 200 or 250 feet? A. Yes, sir.

Q. Now in passing that buoy and going about northwest from it he blew one whistle? A. Yes, sir.

Q. How far were you from him at that time? A. I was about half the distance between him and the western side of the channel. I was still heading over to the westward.

Q. How far were you then from the western line of the channel? A. I can't remember that.

Q. Can't you do a little thinking about that? Well, now, right after that whistle you were looking at the Victory, as I understand, and you saw two puffs of steam from the Victory's pipe but heard no sound? A. No, sir, didn't hear a sound.

Q. How far was the Victory from Craney Island then? A. I guess about 100 yards.

(713) Q. 100 yards south of Craney Island? A. Yes, sir; that is, he looked to be from where I was. I was a good ways from him—we were both a good ways from him, and I don't remember the way the wind was blowing. If it was blowing down the river I couldn't hear him anyway, because those steamers as a general thing have very poor whistles, and I didn't pay any attention to the whistle. I seen the steam; I seen it was two blasts to the second whistle the Plymothian blew. I heard his whistle.

Q. And that was two blasts? A. Yes, sir.

Q. And before that, although you had not heard it, you had seen the puffs of steam, and knew it was two signals? A. I knew it was two signals by the way he came.

Q. Then the next whistles you heard from the Plymothian were the danger signals? A. Yes, sir.

Q. What were the next you heard from the Victory, if you remember? A. I don't remember.

Q. Do you remember whether he blew any danger signals or not? A. I don't remember. I know when the danger signals were blowed the Plymothian stopped and went astern on his ship, and his bow went right around to the east—of course, they will back that way.

Q. Now where were you? Were you still in motion at the time while this whistling was going on? A. I had stopped—going on very slow, and as soon as I seen they were going together I went up to them.

Q. At which whistle of the Plymothain did you stop? A. The danger signal, sir.

Q. You stopped your tug at the danger signal? A. Yes, sir.

(714) Q. How far was the Plymothian then from you? A. Well, I was way on the west side of the channel then and he was on the east side of the channel; wasn't very far from the black buoy.

Q. Well, how far is that? A. He wasn't over 100 yards from the black buoy, the lower one down.

Q. It was No. 7 then; it is No. 9 now, I believe. How far were you? A. I was on the western side of the channel.

Q. How was the buoy bearing from you, about? A. Bearing from me, about, the way I was laying, about northeast.

Q. At the time you were at that place and the Plymothian blew his danger signal, where was the Victory? A. The Victory was about half way between Craney Island and the buoy.

Q. Did you notice whether the Victory appeared to slacken her speed at all or not? A. Oh! yes, sir.

Q. When, before or after the Plymothian's danger signals? A. Well, I don't remember about that part, but I know he went astern on her.

Q. You could see that, could you? A. I could see his wheel.

Q. What do you mean by seeing his wheel; see the propeller itself? A. Yes, sir, saw his propelier.

Q. He was light, and I suppose his propeller was out of the water a little? A. Yes, sir.

Q. How much of the blade stuck up? A. I don't remember about that.

Q. A very short distance. Even on light steamers it sticks up very little? A. Some of them, half of them, stick up, and some probably 18 inches. I couldn't tell about (715) hers. Hers must have been pretty well down, because she is a sharp ship.

Q. She was down by the stern—drew more water astern than forward? A. Very likely.

Q. And you could see she went astern? A. I could see the water from his propeller.

Q. And you could see the propeller itself? A. I don't remember whether I could see the propeller or not. I could see the water.

Q. You saw the water coming forward towards the bow? A. Yes, sir.

Q. Did it come forward of the bows? A, No, because she had too much way on her. I know he was backing.

Q. When do you think he commenced to back? How far was he from buoy 7 when he commenced to back? A. I can't tell.

Q. Was he as much as about half way between the buoy and Craney Island? A. No, sir; not as far off as that.

Q. Can you give us any judgment of how far or close he was from the buoy? A. I should judge he was about a length or two lengths when he started astern. That's as near as I can come at it.

Q. If you can't judge any space suppose you give us an idea in time. How long before the collision was it when you first noticed this back water and knew from that that she was backing? A. I don't think she ran over a length before she was into her.

Q. How long in time? A. I don't know, Mr. Hughes, that's done pretty quick.

Q. What part of the Victory did you see when she gave (716) her first whistles? A. I seen he was heading right up the river.

Q. From where you were, which side of her did you see, and how much of which side did you see? A. She was heading from where I was lying about for me.

Q. Then you saw her bows on? A. Yes, sir.

Q. When you saw her give her first whistles? A. No, not when he gave his first whistles; I could see his starboard side.

Q. How did you see him when he gave his second whistles? A. About the same direction.

Q. What did you see when he gave his third whistles? A. The Victory?

Q. When he commenced to back, I will say? A. Why, he was coming on, getting broadside on to me. He was coming up to me all the time.

Q. You always saw the starboard side of the Victory? A. Yes, sir; when he came around the bight he was head on to me; there is a bight there, and I ran around the bight, and when he got to Craney Island he went around the shore there, and I could see his starboard side all the time.

Q. When you stopped you were then, as I understand, about half way between the Plymothian and the western bank? A. Yes, sir, when I stopped.

Q. Now at that time what part of the Victory did you see? A. I saw his starboard side. Of course I don't mean to say he was broadside on to me. If he had had his side-lights up I could not have seen his port light.

Q. You would have seen his green and mast-head lights? A. Yes, sir.

(717) Q. The only boat you remember in the river was the Virginia Dare? A. That's the only one I remember—that is, passing.

Q. Did you see her before or after the collision? A. I don't remember whether I seen her before or after. I think I seen her before. That's only the thinking part.

Q. Well, about the thinking part, where do you think you saw her—off Craney Island light, Lambert's Point light, or where? A. The Virginia Dare bore about from Lambert's Point to the Merrimac buoy.

Q. At that time you were at Lambert's Point pier, I suppose? A. No, sir; I was out in the river.

Q. But I understand you to say it was before the collision? A. I say I don't remember whether it was before or after, but I think it was before. I was out there.

Q. Did you see any other steamers go down just before or just after the collision? A. No, sir, not as I remember.

Q. See any schooners? A. I don't remember.

Q. What boat did you say you were on? A. The Commodore.

Q. What one do you command now? A. The Katie.

Q. Who did you say owned her? A. Mr. Twohy.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. I want to be a little clear about your estimate of time as to these whistles of the Plymothian. You said you heard one whistle of the Plymothian just after she rounded buoy 9? A. Yes, sir.

(718) Q. Then you saw two puffs of steam from the Victory? A. Yes, sir.

Q. And then you heard another whistle from the Plymothian of one blast? A. Yes, sir.

Q. How long was it between the first whistle of the Plymothian and the puffs of steam from the Victory? A. The first whistle the Plymothain blew?

Q. And the two puffs of steam of the Victory? How long after the first whistle of the Plymothian was it before you saw the puffs of steam from the Victory? A. I don't know; I think it was about three or four seconds.

Q. How long after you saw those puffs of steam from the Victory was it before the Plymothian blew her second blast? A. That was about the same.

Q. A very short length of time? A. Very short, yes, sir.

Q. You heard the whistle of the Plymothian before you saw any puffs from the Victory at all? A. I heard the Plymothian blow first before I heard the Victory.

Q. Or before you saw any puffs? A. And before I saw it.

RE-CROSS-EXAMINATION.

By Mr. SHARP:

Q. How many seconds was it from the time the Victory gave the signal which was denoted by the two puffs of steam, and the two blasts of the whistle which you heard? A. I should judge about three or four seconds apart; that's about as close as I can come at it. It has been so long that it is a hard job for a man to give anything about that.

(719) Q. About the same distance apart? A. Yes, sir.

Q. About the same distance there was between—A. The first.

Q. And which was in your judgment about three or four seconds apart? A. Yes, sir.

Q. And not more? A. No, sir; I call them cross signals myself.

Q. (By Mr. MYNDERSE) Those double signals you call cross signals? A. When I blow one whistle to a man, and he gives me two I consider he gives me a cross signald.

Captain JOHN I. CLARK, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. John I. Clark; 25; Norfolk; Captain of the tug "Mary & Joe".

Q. How long have you been following the water? A. About six and a half or seven years.

Q. What is your position now? A. Master of the water boat Mary & Joe.

Q. What were you in November, 1891? A. Master of the same boat.

Q. What is you business? A. Our business is at Lambert's Point, to furnish water to vessels at Lambert's Point.

Q. You have occasion to be at Lambert's Point every day then? A. Yes, sir.

Q. Are you acquainted with the channel of that river at that point? A. I have been around there several times. I think so.

(720) Where were you on the afternoon of the 12th of November, when the steamship Plymothian had a collision with the steamship Victory? A. Standing on the north side of that pier.

Q. That is, the north one of the coal docks? A. On the old dock, the wooden dock.

Q. That is the northern? A. Yes, sir.

Q. Were you in a position to see everything that happaned in the river at that point? A. Yes, sir.

Q Just state everything you saw. A. I was standing on the old dock there when the Plymothian left the pier with her wheel a-port. She blew one long whistle, leaving the dock, and when she got clear of the dock to the No. 9 buoy, the tug Pioneer was about 20 to 30 yards to the east of the black buoy No. 9, and the Plymothian blew three whistles as a salute to him and was answered by the tug Pioneer; then she went down, keeping on the eastean side of the channel, blew one long whistle to the steamer Victory coming up; the Victory answered with two; the Plymothian a little while afterwards blew one more, which was answered by two; and the Plymothian blew three whistles, and must have went back on his engine, because her stern sheered to the westward, and that's all I know. I heard the crash but didn't see them hit.

Q. Had you turned away before the steamers came together? A. I couldn't see; she hit her on the port side and that was down below.

Q. The Plymothian exposed her starboard side to you? A. Yes, sir.

Q. Did you notice the headway of the Plymothian at the time of the collision? Was she going ahead? A. I don't (721) think the Plymothian was going ahead but very little, if any—not much.

Q. You have testified as to the whistles of the Plymothian; did you hear them? A. I heard them.

Q. How were they? A. Very clear. About as clear as any tramp steamers.

Q. And you are positive as to having heard those whistles? A. Yes, sir.

Q. Now as to her going down, as you say, on the eastern side of the channel; you were in position to see the course down there? A. I could see the course, and I think he kept as near the east as he ought to go down with a loaded ship.

Q. How close did he pass to buoy 9? A. About half a length of his ship to the west.

Q. He left the buoy to the east? A. Yes, sir.

Q. You think about 100 feet? A. Yes, sir, about half a length to the westward.

Q. And directed his course down the eastern side of the channel? A. Yes, sir.

Q. Did you at any time see him over on the western side of the channel? A. No more than he ought to have been.

Q. Did you see him as far to the westward as the middle of the channel? A. Not quite. I don't think he was quite to the west; I don't think he was quite as far as mid-way of the channel at all; always to the east half.

Q. How about his speed? A. The Plymothian?

Q. Yes. A. He didn't have any chance to get any headway on her at all hardly.

(722) Q. And at the time she blew her three whistles, the danger signals, and went astern she was making a faster speed, wasn't she? A. I don't know, because you couldn't tell that much standing on the dock. You could just see the ship going, but couldn't tell how fast she was going.

Q. And the same way with the Victory; you couldn't tell how fast she was going? A. No, sir; couldn't tell how fast she was going.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q As I understand, you were standing on the dock; what part of the dock? A. Right under the old lighthouse—at the very end.

Q. You were down on what you might call the main deck of the dock? A. Yes, sir; on the bottom of the coal pier.

Q. And of course the Plymothian passed right by where you were standing? A. Came right out of the dock like this and turned around.

Q. What was the first sound you heard from her whistle? A. Leaving the dock.

Q. A dock whistle? A. Yes, sir.

Q. How long had you been standing there? A. I expect about 5 or 10 minutes before she went out. I was talking to the engineer of some other ship there; but I forget his name and the name of the ship.

Q. That was the dock signal you heard? A. Yes, sir.

(723) Q. And that was the first sound you heard from his whistle, was it, while you were there? A. Just before he started, and while starting, he had it blowing, and kept it blowing until he got his vessel about half-way out of the dock.

Q. That is the dock whistle you speak of? A. Yes, sir.

Q. Then the next whistle he blew, as I understand, was the salute to the Pioneer? A. Yes, sir.

Q. Where was he when he blew that whistle? A. Right abreast of buoy No. 9.

Q. West or east or south. A. To the west of it, and the Pioneer was to the east.

Q. Then if he blew the whistle when he was west of the buoy, he had gotten out in the channel and straightened up in the channel? A. Yes, sir.

Q. And that's where he was when he blew the whistle to the Pioneer? A. Yes, sir.

Q. And the next you heard was one whistle to the Victory? A. Yes, sir.

Q. And you heard the Victory reply with two? A. Yes, sir.

Q. And the next whistle you heard from the Plymothian was another single whistle to the Victory? A. Yes, sir.

Q. And you heard the Victory reply to that with two? A. Yes, sir.

Q. What was the next you heard? A. Three or four blown by the Plymothian and answered by the Victory.

Q. After the two you speak of? These three or four were short? A. Yes, sir; danger signals.

Q. And you heard the Victory answer them? A. I seen (724) steam coming from his whistle, and he seemed to be blowing like the other did.

Q. Both blowing at the same time? A. No, sir; the Victory blew a little after.

Q. The signals you heard from the Plymothian were the dock signal, three to the pioneer, next one whistle to the Victory, another to the Victory, and next the danger signals? A. Yes, sir.

Q. That's all you heard? A. Yes, sir; that's all I heard.

Q. Then you say he passed about half a length from the buoy? A. Yes, sir.

Q. You said something I didn't catch about turning away. When did you turn away? A. Who?

Q. You? You were not looking at both vessels from the time the Plymothian left? A. Yes, sir; I was looking at the Plymothian leave and waiting for the Victory to come up.

Q. Did you notice the Commodore while you were waiting there? A. She was around there somewhere, but I didn't notice where she was at all. We see so many going by there we don't notice them, but they happened to catch me with this Plymothian.

Q. And you noticed them both up to the time of the collision? A. Yes, sir.

Q. Did you notice the Plymothian's helm or rudder as she left the dock? A. The helm was a-port.

Q. What do you mean by a-port? A. To the left. Her rudder was this way—like that—to the starboard, and her helm was a-port.

(725) Q. How much a-port? A. It must have been hard-a-port. I think so. I couldn't see the wheel and couldn't tell by that.

Q. But you could see the rudder? A. Could see her sheering around, that's about all.

Q. Couldn't you have seen the rudder in the water? A. I might have seen it, but I didn't pay any attention to it; but her helm was aport.

Q. Did you notice the Merrimac buoy? You know where that is, on the other side? A. Yes, sir.

Q. Do you know how the Plymothian passed with reference to that buoy? A. I didn't notice that at all— I couldn't see that, because I was standing on the coal dock.

Q. You could see that buoy from the coal dock? A. Yes, sir; I could if I had thought of it, but at that time there was nothing thought of a collision.

Q. I understand you to say the Plymothian went as near to the east as it was prudent to go? A. Yes, sir.

Q. And you think he was a little to the east of midway? A. Yes, sir.

Q. When he passed buoy 9— How far below buoy 9 was he when he got straightened out in the channel? A. I don't remember now. I couldn't tell that, it has been so long, you know; but as soon as he thought he could straigten he straightened down. I should say 200 yards or 150 yards.

Q. Below buoy 9? A. Yes, sir; by the time he got straghtened down after he turned the buoy, I should say 150 or 200 yards.

Q. Do you remember how the tide was? A. Nearly flood tide.

(726) Q. Of course the flood-tide would catch him first on the bow as he went out, and would have the effect of taking more room to turn around? A. Yes, sir, until he got clear. As soon as his stern got clear of the dock he turned right around.

Q. Don't the tide run faster in mid-channel than it does out? A. Yes, sir; her wheel going would make her stern turn faster, you know.

Q. Do you mean her stern would turn faster than her bow? A. Well, I mean it would make her turn faster with a flood-tide than with an ebb.

Q. Isn't there a breakwater along the dock? A. Yes, sir.

Q. Which did the tide strike first, the bow or the stern? A. I should think about the same. The breakwater is only a row of piles, nothing to hold it off at all; the tide comes through there the same as anywhere else. The piles are a foot and a half apart.

Q. You think the tide runs as fast through that breakwater as it does in the channel? A. It might run faster, because it runs against the pier itself.

Q. And you think putting a dam across there would make it run faster? A. You couldn't call this a dam. I suppose there are 1,500 piles driven along the dock; that's all.

Examined by Mr. SHARP:

Q. Where was the Victory when you heard her first signal of two whistles? A. About at Craney Island light, I believe.

Q. Where was he when you heard her second? A. Just this side of it—a little this side of it.

(728) Q. How many seconds apart were the two whistles? A. I don't know, sir.

Q. As much as half a minute? A. They might have been.

Q. Any more? A. I don't know, sir; never thought of it.

Q. You heard both of them distinctly? A. I heard both the whistles, yes, sir.

Q. Both the signals from the Victory distinctly? A. Yes, sir. She was the furthest down and I couldn't hear them as plain as—.

Q. Did you hear them? A. Yes, sir.

Q. You heard those signals of two whistles each from the Victory when you were at Lambert's Point? A. Yes, sir.

Q. And about half a minute apart or less? A. They might have been less or might have been more; I don't know.

Q. How much more? A. I couldn't tell that.

Q. Was it half a minute? A. We will put it at half a minute.

Q. Do you think it was about half a minute? Is it your judgment they were about half a minute or what is your judgment? A. Inside of a minute.

Q. And you have no doubt that she gave two whistles first and then repeated two whistles? A. The Plymothian gave two whistles.

Q. No, I am talking about the Victory. You have no doubt, as you have testified, that you heard first as signal of two whistles to the Plymothian when the Victory was off Craney Island? A. Yes, sir.

Q. You heard that distinctly and clearly? A. I heard (729) them as good as I could for as far off as it was, a mile. I heard the whistles.

Q. As far as you could hear any whistles at that distance? A. Any tramp whistles.

Q. And was there any difference between them and the second whistles you heard after that time? A. I don't think there was.

Q. You didn't see the steam, you heard the whistles? A. Yes, sir.

Q. Didn't see the steam? A. Yes, sir, I saw the steam, too. Steam is bound to come from the whistle.

Q. You mean you didn't see the steam without hearing the whistles? A. No, sir, I heard the whistles.

Q. And they were as loud and clear as whistles are from that distance, each time? A. Yes, sir.

Q. And about the same? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. When you speak of the eastern edge of the channel, you mean the buoy line of the channel? A. Yes, sir.

Q. You call the buoy line the line of the channel? A. Well, a little to the west of the buoys.

Q. The channel line is just inside the buoys? A. Yes, sir.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. I just wanted to ask you about the position of the Plymothian when you heard the salute given the Pioneer. (730) About where was she then? A. Just about abreast of the buoy; just straightening down.

Q. Was she to the north of an east and west line or just about west of the buoy? A. The Pioneer was to the east of the buoy and the Plymothian was to the west.

Q. On an east and west line how was she with reference to the buoy when she blew these salutes? Had she passed or was she just passing? A. Just passing.

Q. The buoy was to the east when she blew it? A. Yes, sir.

Mr. W. T. HARRISON, a witness for the Plymothian, sworn.

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. W. T. Harrison; 36; engineer; residence Berkley.

Q. What are you employed on now? A. Tug Pioneer.

Q. In what capacity? A. Engineer.

Q. Where you on the Pioneer in 1891? A. Yes, sir.

Q. Were you down the river the evening of November 12th, 1891, when the Victory and Plymothian came into collision? A. I was.

Q. I wish you would tell the judge, please, what you saw and heard? A. When the ship backed out of the dock, of course, I wasn't paying any attention to the ships at all, or the passing boats, but as she got abreast she saluted the Pioneer with three whistles, that called my attention, and I walked on the starboard side of the tug, and I heard Captain Clark speaking to the pilot on board of her, and I (731) walked back in the engine-room and didn't pay any more attention; and a few minutes after that Captain Clark ran back and said, "there's going to be a collision." I said why, and he said because they blew cross whistles, and about that time the Plymothian blew one whistle (I didn't hear the first one), and the Victory answered with two, and a few minutes after that the loaded steamer Plymothian blew three whistles as a distress signal that there was going to be a collision, to back engines, I suppose, and the Plymothian backed her engines, and I couldn't say whether the Victory did or not, because the Plymothian was between us. I am sure the Plymothian was backing.

Q. Was she making headway or what? A. No, sir, her headway was killed and she swung around.

Q. Where were you when this salute was given? A. On the starboard side in the engine-room door.

Q. Where was the Pioneer? A. I don't know the number of the buoys, because I don't pay any attention to the buoys, but we were pretty near abreast of the black buoy at Lambert's Point.

Q. To the east of it? A. Yes, sir, between the pier and the buoy.

Q. Not in the channel? A. We were to the east of it,

and of course, the Plymothian was to the channel side and we were on the shore side.

Q. How close did the Plymothian pass to that buoy? A. I don't suppose more than 35 or 40 feet.

Q. Right close aboard? A. Yes, sir,

(732) Q. And then you didn't observe her until this conversation with the Captain? A. No, sir, never paid any attention to her at all.

Q. When you heard this conversation and saw her again where was the Plymothian, in mid-channel, or on the western or eastern side? A. As far over on the eastern side as it would be safe.

Q. Well, on the eastern side? A. Yes, sir.

Q. Could you judge of the speed she was making then? A. I don't suppose she was making over three or four miles an hour, if she was going that: she hadn't hardly got underway.

Q. Then you heard one whistle from her answered by two from the Victory? A. Yes, sir.

Q. And then you heard the Plymothian give three blasts and go back on her engines? A. Yes, sir..

Q. During all that time the Plymothian was on the eastern side of the river? A. Yes sir.

Q. And at the time of the collision her headway was checked? A. Yes, sir, wasn't going ahead at all.

Q. You hadn't observed her when she first came out of the dock, and the first you knew of her was when she passed you and gave a salute? A. Yes, sir.

Q. How about those whistles; did you hear them distinctly? A. Yes, sir.

Q. How were they in respect to being loud and clear? A. When they blew the salute whistle the first wasn't very loud, but the other was distinct enough; I suppose it was full of water or something, but when she blew the pass whistles they was.

(733) Q. The pass whistles? A. Signal whistles.

Q. They were clear? A. Yes, sir, clear and distinct. As to the first she blew, the three to the Pioneer, the first wasn't so loud, because the pipe was full of water.

Q. Where was the first blown? A. She blew three, but I meant the first one out of the three; of course after the water was blown out of the pipe the other two sounded all right, and it wasn't a few minutes before they used the whistle again and it was all clear and distinct.

Q. You said you didn't hear the whistles of two steamers which called the attention of Mr. Clark and made him have a conversation with you, because he said they blew—? A. Cross whistles.

Q. You had stepped to the engine-room? A. Yes, sir; and when he spoke that I walked out on the stern with him and held the conversation.

Q. Were you coming towards the pier? A. Yes, sir.

Q. And when you walked out on the stern you had a clear view of the ships? A. A clear view; yes, sir.

Q. Could you tell anything about the speed of the Victory? A. No, sir, I couldn't, because I wasn't paying any attention to the Victory—neither one of them, until the captain asked me to come out there and told me that they were going to have a collision, though I had noticed them coming up the channel. I might give some idea, but I didn't notice them at all.

Examined by Mr. MYNDERSE:

Q. You say Captain Clark, of your vessel, had told you these vessels had blown cross signals? A. Yes, sir.

(734) Q. When did he tell you that? A. After they had blowed the whistles once.

Q. You call those signals pass whistles? A. Yes, sir.

Q. You say he told you there was going to be a collision? A. Yes, sir; he said, "Tom, there's going to be a collision." I said, "Why," and he said, "Because they blowed cross signals."

Q. And later you heard the whistles? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. Was your boat in motion at the time? A. Yes, sir, working very slow, under one bell. After he came back to me and spoke he says, "Stop her," and I stopped her and walked on the stern.

Q. You were the engineer on duty? A. Yes, sir.

Q. And of course as the Plymothian came out of the dock you were probably in the engine-room attending to your duty? A. Yes, sir, I was in there attending to my duties.

Q. When the Plymothian gave your boat this salute where was your boat with reference to buoy No. 9? Which direction was buoy 9 from you? A. Same as we were coming up this way to the pier, this buoy was sitting *of* here. I don't know the compass; I couldn't tell you anything about the compass, but the engine I could tell you all about. The buoy was sitting here in about this angle to us.

Q. And angle of about 45 degrees to your boat? A. Yes, sir; something about that, I suppose.

(735) Q. And your attention was directed by this salute blown to you? A. Yes, sir.

Q. Where was the Plymothian in reference to that buoy when she blew you this salute? Had she passed the buoy? A. Yes, sir, passed the buoy and right abreast of us. We were about as far from the buoy as he was. The buoy was on his stern and on our bow.

Q. At the time he gave you this salute the first black buoy next to Lambert's Point was on his starboard quarter? A. Yes, sir, about on his starboard quarter.

Q. About how far off? A. About 35 or 40 feet, I suppose, when he passed the buoy.

Q. You didn't see him pass the buoy? A. I see him pass the buoy of course.

Q. You saw him after he passed, but did you see him actually pass the buoy? A. Yes, sir, saw him after he passed the buoy and remarked that I didn't see him come out of the dock, and as he came around the buoy we wasn't to the buoy and its natural he shouldn't blow a salute whistle until he got abreast of us.

Q. When he blew this salute whistle was he out in the channel? A. Yes, sir, kind of on the east side and kind of straightened up the river.

Q. And this salute, as I understand your testimony, and if I am wrong of course you will correct me, consisted of three whistles and the first wasn't very loud because water was in the pipes? A. Yes, sir, because there was water in the pipes, and they don't sound loud the first blow, none of (736) those steamers.

Q. And the next two did? A. The next two sounded distinctly.

Q. Then you didn't hear the first interchange of whistles, passing whistles, between the two steamers? A. No, sir, because I was back in the engine room. I was standing in the door when they blew the salute.

Q. You heard the second passing whistles? A. Yes, sir.

Q. What were they? A. The Plymothian blew one and the Victory answered with two, and Captain Clark said they were going to hit each other blowing whistles like that, and then the Plymothian blew three and reversed her engines.

Q. Did the Victory answer with three? A. I don't think she did. I don't recollect, but I don't think she answered the three danger whistles at all.

Q. Did you see the Victory then, or was the Plymothian between you and him. A. No, sir, not exactly between us, because she was coming up the river in that direction, and as soon as the Plymothian reversed his wheel he swung across the channel and was right between us.

Q. Could you see the Victory before the Plymothian swung around in that way? A. Yes, sir.

Q. When you looked at the Victory then, was she to the east or west of the Plymothian? A. To the west coming up: on the west bow of the Plymothian.

Q. And you were to the east of buoy 9? A. To the east of that first black buoy.

(737) You were east of the buoy off Lambert's Point? A. Yes, sir.

Q. And when these second whistles you spoke of were blown the Plymothian was in the channel, and the Victory was in the channel? A. Yes, sir.

Q. And yet you say the Victory was to the left of the Plymothian. Did you see the Victory over the right-hand side of the Plymothian or the left-hand side of the Plymothian? A. When, after they blew the cross whistles?

Q. When they blew the first cross whistles that you heard? A. Yes, the Victory was on the west side.

Q. Leave out of the question the east or west for a minute and let's come down to this. When you saw the two vessels at the time the collision happened the Plymothian was going down the river, and you saw her starboard side, didn't you? A. Yes, sir, saw her starboard side.

Q. And the Victory was coming up the river? A. Yes, sir.

Q. Now, in looking at the Victory coming up from your boat, did you see her along on the right-hand side of the Plymothian or the left-hand side of the Plymothian? A. I could see her across the Plymothian's bows, because they want close enough together to hide it in that way.

Q. Then you saw the Victory along the right-hand side of the Plymothian? A. Yes, sir—couldn't see her any other way?

Q. And if you couldn't see her any other way, you did see her that way? A. Yes, sir, I saw her that way.

Q. How were the Victory and Plymothian heading with (738) reference to each other at that time—I am speaking of the time they exchanged the set of whistles you heard, and before the Plymothian began to swing across, as you describe? A. I don't exactly know how to understand that. I would like to explain it right, but it's been done so dogged long I don't remember. If I know, I want to study and see.

Q. That's whaat I want you to do? A. I couldn't say that how they were heading. One was coming up the channel and the other down, but I couldn't say whether they were bows on or quartering, or how. It has been so long ago, and I didn't think there was anything coming from it; if I had, I would have got it perfect.

Q. In looking down from where you were you could see the first black buoy below the pier? A. Yes, sir, plain enough.

Q. How did the Victory look with reference to that buoy, as well as you remember—at the time they exchanged those cross signals that you heard? A. She was out pretty near the middle of the channel, from the best I could give you. When you take one boat coming right up you can't give much of an idea how they are coming.

Examined by Mr. SHARP:

Q. At that time the Plymothian was heading across to the east? A. No, sir, not heading across to the east; running on the eastern side of the channel.

Q. After she backed she swung her head to the eastward? A. Yes, sir.

Q. How could you see the Victory with the Plymothian between you and the Victory? A. I stated I didn't see her (739) after she swung around.

Q. You stated the Victory was in mid-channel and you were to the east and the Plymothian was to the east. How could you see the Victory? A. We were just east of the channel.

Q. But if the Plymothian was heading to the east wouldn't she be between the Victory and you; A. Of course.

Q. Then you couldn't see her in mid-channel? A. Couldn't see her after the Plymothian swung across.

Q. From the time the Plymothian swung around you couldn't see the Victory? A. After she swung around I couldn't see her.

Q. Did the Plymothian swing around when she gave the danger signals to the Victory? A. Soon after; she blew the signals first.

Q. How long a time elapsed from the time of blowing the danger signal to the collision? A. Propably three or four minutes before she swung around.

Q. She didn't swing around for three or four minutes after she blew the danger signals? A. Yes, sir; but reversed her engines immediately. We were close enough to see the wheel had been reversed and was working backwards.

Q. She swung around three or four minutes after she blew the danger signal? A. Yes, sir.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. And when she swung around the collision occurred?

A. Yes, sir. We didn't see her hit the Victory, but heard (740) the crash. We went immediately at once to where the collision occurred, and Captain Clark asked the pilot of the Victory if he wanted assistance; I didn't hear what he said but I suppose he didn't, and he backed off and came on up the channel.

Q. (By Mr. SHARP) And after she swung around you were looking down across the bows of the Plymothian and saw the Victory? A. No, sir; I did not.

Captain JOSEPH M. CLARK, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. Joseph M. Clark; 31; pilot; Norfolk.

Q. How long have you held a license? A. I have been licensed nine years.

Q. Have you been engaged in the vicinity of Lambert's Point? A. Yes, sir.

Q. How long? A. I have been on the river all the time—nine years.

Q. And you were on the river before you got a license I suppose? A. Yes, sir.

Q. How long have you been cruising around the waters of the Elizabeth river around Lambert's Point? A. Since the coal piers have been built.

Q. What position did you occupy on the Pioneer in November, 1891? A. I was captain of her.

Q. Were you there in the vicinity of Lambert's Point on (741) the afternoon that the Victory and Plymothian had a collision? A. Yes, sir.

Q. Just state what you saw and heard with reference to that collision from the time the Plymothian left the coal pier? A. We were below No. 9 buoy when the Plymothian came out from the wharf, and when she got abreast of me, just below the buoy, she blew three whistles to me, and I answered the salute, and I didn't pay any attention then until she passed by, I suppose 100 yards, and then he blew one whistle, and I looked around out of the pilot-house door to see what he was blowing at. I knew the Victory was coming up, because I was waiting for her, and the Victory answered with two. I could see the whistle from the pilot-house. I was at my starboard pilot-house door looking out of the window.

Q. And you saw and heard the Plymothian blow this one whistle and heard the Victory answer with two? A. Yes, sir; and shortly after that the Plymothian blew one again,

a long whistle, and that was answered with two from the Victory. When the first cross whistle was blown, my boat was drifting, we were waiting for the Victory. I went out of the pilot-house and walked aft and said to the engineer they were going to have some trouble between the two ships; and he came out too, and we both were standing on the stern of the boat when he blew the second one whistle; we were standing aft, and when it was answered we were standing there, and shortly after that there were three alarm whistles given by the Plymothian, and then both vessels approached near together; the Plymothian was backing, I suppose, but the Victory came up and hit her broadside. (742) She was backing too.

Q. How was the Plymothian moving at the time of the collision in respect to her headway; was she making headway, sternway, or still? A. Standing pretty near still. Had very little way if any.

Q. She had been under reversed engines from the time this danger signal was sounded? A. Yes, sir.

Q. Did you see the Plymothian leave the dock? A. Well, I suppose I seen her, but it has been so long ago, I didn't pay much attention to that.

Q. You don't remember whether she gave a whistle on leaving the dock or not? A. No, sir; I couldn't say.

Q. How close aboard the buoy were you when the Plymothian was passing the buoy? A. The buoy I suppose was just a little ahead of us, and I suppose was 10 or 12 yards on our starboard bow.

Q. How far was the Plymothian from the buoy on the other side? A. Not over 50 yards at the outside.

Q. How was she in respect to the buoy when she gave those three whistles? Had her bow or midships or stern passed the buoy? A. I guess her stern was about passing.

Q. And she went then, you think, 100 yards, or a little over, when you heard her blow this first signal? A. I judge so.

Q. And that you heard answered by the Victory down the river? A. Yes, sir.

Q. About where was the Victory, in your estimation, when she blew those first whistles? A. In the neighbor- (743) hood of Craney Island light. I couldn't say whether she was below or above.

Q. Could you judge of her speed then? A. No, sir.

Q. How was the Plymothian moving up to the time she reversed her engines? A. Hadn't gathered much headway; she was loaded.

Q. Could you estimate her speed at all? A. I don't think she was going over four knots.

Q. How was the tide, with her or against her? A. Flood tide.

Q. That would be against her and in favor of the Victory. Did you have any difficulty in hearing those whistles of the Plymothian? A. Oh! no; they were sound.

Q, How did the Plymothian move down the river, in mid-channel, the east or west side? A. Well, when she passed me she was, I suppose, about 50 yards from the buoy and moving right down on the eastern side of the channel.

Q. And continued to move that way up to the time she reversed her engines? A. Yes, sir.

Q. Well, how did she move up to the collision? A. Her bow swung around to the eastward and they went ahead on her engines and put her ashore.

Q. That was after the collision; but from the time she reversed up to the collision her head was moving to the eastward? A. Yes, sir; her bow going to starboard.

Q. She was making very little headway at the time. A. Yes, sir.

Q. How rapidly did the Victory come into her, could you judge? A. I don't suppose she had much headway. I was then half a mile away from them when the collision occurred.

(744) *Island Light. I couldn't say whether she was below or above.*

Q. Could you judge of her speed then? A. No, sir.

Q. How was the Plymothian moving up to the time she reversed her engines? A. Hadn't gathered much headway; she was loaded.

Q. Could you estimate her speed at all? A. I don't think she was going over four knots.

Q. How was the tide, with her or against her? A. Flood tide.

Q. That would be against her and in favor of the Victory. Did you have any difficulty in hearing those whistles of the Plymothian? A. Oh! no; they were sound.

Q. How did the Plymothian move down the river, in mid-channel, the east or west side? A. Well, when she passed me she was, I suppose, about fifty yards from the buoy and moving right down on the eastern side of the channel.

Q. And continued to move that way up to the time she reversed her engines? Yes, sir.

Q. Well, how did she move up to the collision? A. Her bow swung around to the eastward and they went ahead on her engines and put her ashore.

Q. That was after the collision; but from the time she reversed up to the collision her head was moving to the eastward? A. Yes, sir; her bow going to starboard.

Q. She was making very little headway at the time? A. Yes, sir.

Q. How rapidly did the Victory come into her; could you judge? A. I don't suppose she had much headway. I was then half a mile from them when the collision occurred.

(745) Q. And you couldn't judge about the speed of the Victory? A. I think they were trying to stop her.

Examined by Mr. MYNDERSE:

Q. You heard the Victory blow a double signal twice? A. Yes, sir.

Q. And each of those was a cross signal to a single blast blown by the Plymothian? A. Yes, sir.

Q. There had been two cross signals that you heard? A. Yes, sir; the Plymothian blew one whistle first; answered by two; and blew one again that was answered by two.

Q. After you heard this first cross signal you called out your engineer? A. Yes, sir.

Q. And he was standing by you on deck at the time you heard this second cross signal? A. Yes, sir.

Q. How long after this second cross signal was it that you heard the danger signal of the Plymothian? A. I couldn't tell; I suppose a couple of minutes.

Q. Did you hear any danger signal from the Victory? A. Yes, sir.

Q Did she blow hers before or after the Plymothian? A. After the Plymothian.

Q. How far apart were the vessels, you think, when they blew those danger signals? A. I don't think they were over a quarter of a mile. I don't know that they were that far.

Q. When you say the whistles of the Plymothian were sound what do you mean? A. She had a loud bass whistle and they were perfectly clear. When they started to (746) blow they sounded clear.

Captain James Wynne, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. James Wynne; 32; Norfolk; steamboat man.

Q. Have you a license; if so, how long have you had it? A. 15 years, sir.

Q. Been following the sea, how long? A. 16.

Q. Have you been engaged much in the vicinity of Lambert's Point? A. Four years and six months.

Q. Do you know the channel pretty well there? A. Yes, sir, I think I do.

Q. In November, 1891, what position did you occupy? A. I was coming out of the mouth of Tanner's creek.

Q. On what tug and in what capacity? A. On the tug "Lumberman." I was captain of her.

Q. And you were coming out of Tanner's creek? A. Yes, sir.

Q. Did you see the collision between the Victory and Plymothian in November, 1891? A. Yes, sir.

Q. Please state what you saw and heard? A I saw the Plymothan when she first left the coal dock, and the Victory when she left was then coming up below Craney Island light-house. The Plymothian sounded her one long blast of the whistle and waited I suppose, an interval about, as near as I can remember, two or three minutes, which the Victory answered with two blasts of a steam whistle, and (747) the Plymothian waited again about the same length of time and blew her another blast of the whistle and the Victory answered with two, the same, and then the Victory was coming up with a strong flood-tide, a pretty good gait, and they were pretty close together and the Victory blew her three or four short blasts, what we call the danger signal, and the Plymothian answered them pretty close together, to avoid a collision, but they collided.

Q. Did you see the Plymothian leave the dock? A. Yes, sir.

Q. Did you notice whether she blew her whistle or not on leaving the dock? A. No, sir, I didn't see her blowing any long dock whistle, because when I seen her she had cleared the dock, because from the mouth of Tanner's creek is a straight line from Lambert's Point light-house, straight across right across there.

Q. And you hadn't observed her until she was rounding down the channel of the river? A. No, sir, I didn't observe her until she got clear of the coal dock.

Q. Could you judge how close she went to buoy 9 that was off that pier? A. Very near to it.

Q. And she proceeded down the river in mid-channel, the eastern side or the western side? A. Apparently to me—I was about half a mile from her—she appeared pretty close to the eastern side of the channel.

Q. What speed was she making after she passed the buoy up to the time she blew her danger signals? A. Hadn't got no headway at all—you know what I mean.

(748) Q. You mean she wasn't full speed? A. No, sir, you know a big steamship like that loaded down hadn't got more than steeringway on her.

Q. After she passed the buoy and coming down the river what was the greatest speed you saw her make before they collided? A. I don't think she was going over three or four miles an hour.

Q. That is the fastest you saw her move? A. Yes, there was a strong flood tide against her.

Q. And she was coming down at that rate on the eastern side of the channel? A. Yes, sir.

Q. When you saw the whistles exchanged and when the Plymothian blew the three whistles what did you observe in respect to her speed? A. I remarked to my engineer at the time, she was coming up there with a pretty strong flood tide, and about the time they collided I said—

Q. I am speaking of the Plymothian? A. She was going down very slow and the other ship was light you know, had no cargo at all.

Q. The Victory was moving up rapidly with a strong flood tide? A. Yes, sir.

Q. And the Plymothian was going down with the tide against her? A. Yes, sir.

Q. And never exceeded four knots you say? A. I should think not, sir.

Q. How was she moving at the time of the collision, making headway, sternway or still? A. Going back on (749) the engines as far as I could see.

Q. How about the ship itself? A. I wasn't close enough to see, but as far as I could see her headway was checked.

Q. You can't be positive of that, but that's your judgment? A. Yes, sir.

Q. How about the Victory? A. The Victory's headway wasn't checked at all until she collided.

Q. She was making headway at the time she struck this boat? A. Yes, sir.

Q. You are positive of that? A. I am satisfied of that.

Q. In the position in which you were, what side of the Victory was exposed to you? A. Her port side.

Q. Broadside? A. Yes, sir.

Q. And you were then in a position to judge; were you or not, as to her speed? A. Yes, going at a right angle.

Q. But the speed of the Plymothian you couldn't judge of at the moment of collision? A. Not as well as I could the other ship.

Q. Describe the whistles of the Plymothian in respect to whether you heard them distinctly or not? A. As I said before, I was at least half a mile from her and heard them

perfectly distinct. I was further from her than the Victory was when she first blew. It was a very calm evening and you could hear sounds very far. You could hear the crash just as plain as you can hear me now.

Q. At the moment of the collision you were at the mouth of Tanner's creek, to the north or south of an east and west (750) line with buoy 7? A. I was about a northeast course from buoy 7.

Q. Then you were of course nearer the Victory than the Plymothian? A. When she blew her first whistle, yes, sir.

Q. And you have no doubt about hearing the whistle of the Plymothian distinctly? A. No, sir.

Q. Or of seeing the Plymothian move on the eastern side of the river? A. No doubt at all.

Q. And that she could never have run more than four miles from the time she reversed her engines? A. No, sir, didn't appear to me to be.

Q. The Victory, on the contrary, was moving with the tide rapidly? A. Yes, sir, moving a pretty good speed.

Q. Could you estimate her speed up to the time she blew the danger signals? A. I should say she was going at least eight or ten knots an hour. Had good headway, I suppose, nothing to stop her from the time she left the capes.

Examined by Mr. MYNDERSE:

Q. Which side of the Elizabeth river is Tanner's creek; the eastern or western side? A. The eastern side.

Q. You say both vessels blew danger signals? A. Yes, sir. Just before they collided; probably two minutes before they collided.

Q. How far apart were they when they blew those danger signals? A. I should judge, sir, about 2 or 300 yards.

Q. Blow them about the same time? A. The Victory blew hers first.

(751) And the Plymothian immediately after? A. Yes, sir.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. As I understand, you were on the Lumberman coming out of Tanner's Creek? A. Yes, sir.

Q. Had you gotten out in the river when you saw the Plymothian blow her first signal? A. Yes, sir, been out of the creek some time. As soon as you got out of the mouth of the creek—you have seen the way the creek

makes in the river. I was, I judge, not to exceed half a mile from the main ship channel.

Q. You had just come out of the mouth of Tanner's Creek? A. Yes, sir.

Q. Did you have a raft in tow or anything of that sort? A. I had two of Nottingham & Wrenn's lighter's in tow, sir.

Q. With that tow how fast were you going? A. I don't think I was making over 2 or 3 knots an hour.

Q. And hadn't gotten into the main channel at the time? A. No, sir, I was just hauling across.

Q. Just hauling across from the mouth of Tanner's Creek to the channel? A. Yes, sir, half way between the flats and the channel.

Q. And you had gotten half way from the channel to the flats when you heard the first signal from the Plymothian? A. Yes, sir.

Q. How far do you think you were from the Plymothian at the time—you said you were about half a mile? A. There was five or ten minutes elapsed from the time he (752) blew the first signal or the time I first saw her until they collided.

Q. Do I understand you to say just now that when you saw her blow this first signal you were then half a mile from her? A. When I heard her blow.

Q. Where was she? A. I judge she was then 3 or 400 yards of the pier, going down.

Q. Just clear of the pier going down, about 3 or 400 yards? A. Yes, sir.

Q. Do you think you can judge with any degree of accuracy, the speed of a ship at that distance coming towards you almost? A. No, sir, not coming towards me. I had a very fair chance. If I had been coming up the channel I couldn't, but I was over here at right angles.

Q. Do you think at that distance you could judge with any degree of accuracy the speed of a ship half a mile off? A. I couldn't judge with any degree of accuracy, but I could see she hadn't gained speed from the time she left the pier.

Q. Do you think at that distance you could judge with any degree of accuracy how close she passed to the buoy? A. Half a mile off?

Q. Yes, sir. Do you think you could tell whether she passed close or far off? A. Yes, sir, I might. I suppose I could tell whether she was as close to the east of the channel as to the west of the channel.

Q. How close do you judge she passed it? A. Passed in 100 yards of it.

Q. Did you see her when she passed that buoy? A. Yes,

(753) sir. I saw her when she passed both buoys: she collided at No, 7.

Q. You saw her when she passed No. 9 buoy? A. Yes, sir.

Q. And you were where you describe? A. Yes, sir.

Q. And you think you can judge how close she passed to that buoy at that distance? A. Yes, sir.

Q. Tanner's creek comes in below Craney Island light? A. Yes, sir.

Q. Tanner's creek comes in some distance below where the official map stops, at least 2 miles from Lambert's Point. Well, now, you saw the Plymothian as she rounded that buoy 9, did you, as she passed buoy 9? A. Yes, sir, as she passed by. I seen her as soon as she cleared the pier.

Q. What was the first whistle she blew after she cleared the pier? What was the first sound you heard from the Plymothian's whistles when she cleared the pier? A. The first I observed was the one long steam blast.

Q. How was the Plymothian then bearing from you? A. Well, I didn't take the bearing on the compass; I couldn't tell you exactly.

Q. By judgment? A. Probably a southwest course from me, as near as I could judge.

Q. What part of the Plymothian did you see as she blew that one whistle? A. I saw the whole broadside.

Q. Which broadside? A. The starboard.

Q. At that time could see any of her port bow or port side? A. No, sir.

Q. Then when she blew that first whistle, in the position in which you were, you saw her starboard side? A. The (754) Plymothian; yes, sir.

Q. I am talking of the Plymothian, the outgoing steamer. And when did you first see her port side, if you ever saw it? A. After the collision, when she came between the two buoys and went up on the shore, and by that time I was right by her, right on top of her.

Q. Did you see her when she commenced to swing around towards the scene of the collision? A. Yes, sir, I seen her when she went to swing around.

Q. Before she commenced to swing around you had only seen her starboard broadside? A. Yes, sir, that's all.

Q. You say that by the time of the collision you had gotten about up there with your tug? A. Yes, sir; when they got her on the flats. A tugboat went up there and pulled her on the flats.

Q That was after she got aground? A. I say about the time they got her on the flats to keep her from sinking. I

passed about that time; the tugboat was pulling on her then to keep her there.

Q. Had you gotten as far up as Craney Island at the time of the collision? A. No, sir.

Q. You were still below Craney Island? A. Yes, sir.

Q. When did you first notice the Victory? A. Between the time the Plymothian blew the first and second whistle. She blew one long whistle first and the Victory answered with two, and that of course will attract any steamboatman's attention; no matter how busy he is, it is natural for him to look up and see what's going to be the trouble.

(755) Q. Then you hadn't noticed the Victory until the Plymothian had given one whistle and she had answered with two? A. I hadn't noticed the Victory up to that time; no, sir.

Q. Was she coming from Old Point? A. Yes, sir.

Q. How was she when she blew those two whistles? A. Heading up for Craney Island—had Craney Island on her starboard.

Q. Had she passed Craney Island when she blew those two whistles? A. No, sir; blew them before she got to the light-house.

Q. She gave those first two whistles before she got to the light-house? A. As near as I can remember. Just after she passed the light-house the Plymothian blew and she blew them other two whistles.

Q. But the first two whistles the Victory blew were before she got to Craney Island? A. Yes, sir.

Q. Did you notice any river steamers going down the river? A. No, sir; I wouldn't have noticed those, only what attracted my attention was these cross signals.

Q. Can you tell whether you remember noticing the Louise that evening or not? A. No, sir; I don't remember seeing the Louise at all.

Q. Do you remember whether you noticed the Accomac? A. No, sir; it had been two years ago—

Q. Nor the Luray? A. No, sir; never seen no river boats at all.

Q. Nor the Virginia Dare? A. No, sir; never noticed—

(756) Q. Had you noticed a tramp steamer going down the channel before the Victory came up? A. None; but, as I said, I seen the Plymothian.

Q. I mean before the Victory came up? A. No, sir.

Q. Did you notice any schooners in the channel along between Craney Island light and Lambert's Point? A. No, sir.

Q. Now, as I understand, all the whistles you heard from the Plymothian from the time she left the dock were:

first, the single whistle which she blew them Victory, which the Victory answered with two; then a second single whistle which she blew to the Victory, which the Victory answered with two; and then three or four short blasts which she blew in answer to the Victory's three or four blasts? A. She blew three or four before the Victory.

Q. The Victory was the incoming steamer and the Plymothian was the outgoing steamer? A. Designating them like that I won't get them mixed.

Q. The Plymothian was the outgoing and the Victory was the incoming, and the first whistle you heard from the outgoing steamer was a long whistle? A. Yes, sir.

Q. Which the incoming steamer answered with two. A. That's right.

Q. The next you heard was one long one, from the outgoing? A. Yes, sir.

Q. Which was answered by the incoming with two? A. Yes, sir.

Q. Then you said the incoming steamer blew three or four blasts and the outgoing steamer answered? A. I said (757) the Plymothian blew distress whistles.

Q. That's what you say now? A. The loaded ship blew the distress whistles first. That's what I meant to say.

Q. You say the Victory was coming along at 9 or 10 miles? A. I judge so. That's what them tramps generally make coming up with a strong flood tide.

Q. Did she pass close to you as she passed your boat? A. She didn't pass as close as the other boat did, the boat coming down to me of course crossed my bow and the Victory, the incoming steamer was coming to me parallel with my course.

Q. As the incoming steamer came up the river before the collision and before she blew any blasts at all, did she pass close to your boat or not? A. Not as close as the other steamer did, because I was heading for the other steamer.

Q. The other steamer never got down to you? A. I wasn't out in the river; I was coming across the flats shaping my course to Craney Island light-house, nearly parallel to the Victory. I wasn't in the channel.

Q. And while coming across the incoming steamer must have passed you. Now, when she passed did she pass close to you? A. No, sir.

Q. You were some distance from the channel? A. Yes, sir; on the flats.

Q. Did you notice how she came up? How close did she pass to Craney Island light-house? A. I judge she passed it.

Q. I didn't ask what you judged, but I asked you what is your recollection about that? A. She came around in the

(758) ship channel. They don't leave Craney Island over 100 or 150 yards—can't do it on account of the channel.

Q. Do you recollect that, or do you give that as your judgment? A. Yes, that's what I recollect.

Q. How was that, about 150 yards from the light-house? A. Yes, sir.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You were talking about coming out to the channel. In coming out from Tanner's Creek you ceme straight across the flats to the channel, as I understand. What is your course after you come out of the creek to get to the channel? A. My first course is direct from the mouth of the creek to Lambert's Point light-house until I get abreast of Craney Island light-house, and then I haul across for No. 9 buoy.

Q. So you don't enter the ship channel to the north of Craney Island light-house, you come in it at buoy 9. A. Yes, sir.

Q. In that why you cross very close to where the Plymothion was aground? A. That's right; right along by that.

Q. And making that course, heading for Lambert's Point pier from the east side of the river, the Victory was moving in somewhat of a parallel course to you coming up the ship channel? A. Yes, sir; not exactly a parallel course.

Q. Somewhat, both moving to the south? A. Yes, sir.

Q. And the Plymothian moving to the north? A. Yes, sir.

Q. Now, how were you in respect to Craney Island at the (759) time the Plymothian passed this buoy 9; were you north or south or about to the east of the light-house? A. I was to the east of the light-house.

Q. You should judge the distance from No. 9 buoy to the spot on the flats where you were to be about half a mile? A. That's it, sir.

Q. And you were then heading about for Lambert's Point pier or buoy 9? A. I was heading for Lambert's Point. I don't haul across. I have to get up right abreast of Craney Island before I haul across there to get 6 feet of water.

RE-CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. As I understood you just now, at the time you heard this first whistle from the Plymothian, you had not actually

passed Craney Island light-house? A. On a parallel line? How do you mean?

Q. You were coming up to Craney Island light-house; at the time you heard the first signal, it had not gotten abeam of your boat? A. That's right; as I told him, I hadn't hauled across for the ship channel.

Q. Craney Island light-house was then on your starboard bow.

RE-RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. That long blast from the Plymothian was the first you had noticed from the ship? A. Yes, sir.

(760) Q. The first time you had taken notice of the ship was that long blast? Yes, sir.

Q. Followed by two blasts from the Victory? Yes, sir.

Q. And that is what directed your attention? A. The two blasts of the Victory whistles attracted my attention.

Q. Having heard the single blast from the Plymothian? A. Yes, sir; just as a harbormen would do in a river or anywhere else.

Court here, at 3 P. M., adjourned until Monday, May 14th, 1894.

(761)

TESTINONY IN OPEN COURT, MAY 14TH AND 15TH, 1894.

Counsel for the Plymothian offered in evidence the pleadings in the libel of Ralli Brothers and others against the steamships Plymothian and Victory, consisting of the libel and the answer on behalf of the Plymothian, and the answer on behalf of the Victory.

Counsel for the cargo, at the request of the counsel for the Plymothian, admits the fact that the cargo of the Plymothian was shipped under bills of lading, and that certain of those bills of lading contained a clause exempting the steamer and her owners from "all loss or damage occasioned by collisions, stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master mariner or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager." And that certain of the bills of lading contained a further clause to the effect that the said contract should be governed by the law of the flag of the vessel carrying the goods, but makes the admission under the reservation that the same is immaterial and incompe-

tent, and further states that he has agreed with the proc-
(762) tors of the Plymothian that they may in the future, if the fact is deemed material or competent, prove just how many of the bills of lading contained this clause.

Captain E. H. SANFORD, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. E. H. Sanford; 54; Baltimore; surveyor.

Q. Marine surveyor? A. Yes, sir.

Q. What has been your experience in marine surveying? A. About 16 or 18 years.

Q. Are you Lloyds' surveyor at Baltimore? A. Yes, sir.

Q. Have you had occasion at any time to thoroughly acquaint yourself with the structure of vessels? I do, as near as I know how, sir, familiarize myself with Lloyds rules and hold to them as near as I can.

Q. Look at the photograph handed you and state whether or not it represents the hole in the side of the Plymothian as you saw her in the dry dock at Newport News, and state when you saw that vessel? A. Yes, sir, that is the idea of the gap.

The photograph is filed marked "Exhibit Photo 4."

Q. Just describe as briefly as you can the nature of that wound? A. It extended from the top plate of the bridge, the upper edge of the gunwale, downwards, seven courses, fractured the stringer plates, several of the angle iron frames and beams to both decks. There were some other minor matters in connection with it,

(763) Q. What penetration did it show on the part of the steamer striking the Plymothian? A. How far it entered the ship?

Q. Yes, sir. A. At the top edge, as near as I can recollect, only a few inches into the stringer plate; the next stringer plate below was worse cut and the one below still worse; I should suppose the deepest part maybe two or three feet.

Q. So far as the stringer plates indicated? A. Yes, sir.

Q. Supposing the Plymothian to have been moving north of east, under a helm hard-a-port, with her bow moving rapidly to starboard and against the tide, the tide being flood running two and a half miles, and supposing the Victory to be moving east of south with the tide, and a collision occurring, the result on the Plymothian being such as you have described, state which of the vessels was the striking and moving vessel?

Question objected to.

A. I am not familiar with the points of the compass down your river and harbor at all, but I can better understand you by models.

Counsel her takes two small models and places them, and says:

Q. That is somewhat the position of the vessels, striking in the neighborhood of an angle of 45 degrees. Now, supposing this vessel to be moving against the tide with her helm hard-a-port, her bow going this way, and this vessel to be moving with the tide, which, judging from the incision in the Plymothian, was the striking vessel? A. Well, with the tide running so, it must have been helping that vessel along (Victory), and this vessel (Plymothian) must have been sagging off a bit at the same time, and I should (764) say that this vessel (meaning Victory) struck, the tide carrying both vessels, and if this vessel had been going ahead much at any rate the edges of the gap on the photograph probably—to me would be greater damage—torn off more of this. She was going ahead.

Q. The vessels striking in that position, with the tide as it was, could the collision have happened if the Victory had stern way on, the Plymothian moving under helm hard-a-port against the tide? A. I don't see how it is possible, with the tide that way, she coming here with a port helm and the tide—I don't see how it is possible.

Q. Can or cannot a vessel move against the tide sideways and strike a vessel making stern way? A. I don't see how it is possible.

Mr. Robert Hughes.

I will admit that if you want any admission on the subject. I admit that vessels do not move sideways. The vessel was moving sideways against the tide according to that question.

Cross-Examination.

By Mr. Robert Hughes:

Q. Did you ever have anything to do with navigating vessels? A. Yes, sir, I was following the sea.

Q. In what capacity? A. As master of vessels.

Q. Steamers? A. No, sir.

Q. Do you think you can judge, or can any man judge anything about the question as to which of the two vessels (765) hit in a collision without knowing the speed of the vessels and whether one was loaded and the other light, and whether one was merely commencing to swing with the helm or had actually swung with the helm, or whether or

not one was backing or the other was backing or both were backing; can you judge? A. No, sir.

Q. Can any one judge? A. I wasn't there and didn't see those things and don't know how the helms were and am unable to judge that matter—of course, I wasn't on the spot. The questions were asked me how about the helms one way or the other.

Q. Can you form any idea of which of those vessels hit the other or which was moving unless you knew from personal observation or the statement of both sides as to how the vessels were going before the collision and how long they had been backing or how long porting? A. Not as well as one there on the spot, but the questions that have been asked me, showing me the photograph, and from the manner in which it looked while I was in the survey, from these things I have answered the questions.

Q. In other words, you have answered them as well as you could with the lights before you, but you didn't have all the lights before you? A. Not being on the spot and not knowing how the helm was and when it was put so, or her speed.

Q. Do you know as a matter of fact whether at the time of that collision the Victory was moving forward or not? A. What's that?

Q. Do you know as a matter of fact whether at the time of collision the Victory was moving forward or not? A. No, sir.

(766) Q. Do you know as a matter of fact whether the Plymothian had ported her helm sufficiently to get her actually floating up stream with the tide? A. I do not, sir.

Q. It is perfectly possible for the Plymothian to have ported her helm and moved for some distance under a port helm, if she was going at any speed at all, before the tide had actually commenced to sweep her up stream, isn't it? A. I didn't exactly get that—it is too long for me.

Q. I will try to make it a little simpler— A. I didn't receive a college education, and all these long questions puzzle me.

Q. Let's see if you have received a marine education. My question is this: A vessel may port her helm and move under port helm against a two-knot tide for some little distance before the tide affects the vessel enough to actually commence sweeping up stream? A. A vessel will move agninst the tide according to her speed—that is, port or starboard her helm and she will move against the tide according to her speed. That they do every day coming up and down the river.

Q. So that the mere fact that a vessel ports her helm

and swings around with her broadside to the tide doesn't show that she is actually floating up stream with the tide, does it? A. If she has got headway on her and has moved her helm any time, and when she's got speed enough, of course, she will go against the tide.

Q. That's it exactly? A. That's what I said before.

Q. So I understood it; I just wanted to make it plainer. (767) When was it that you first saw the Plymothian? Can you give me the date you first saw her in the dry-dock? A. Some time in November.

Q. Have you any memorandum by which you can give the exact date when you first saw her? A. The 26th day of November.

Q. You first saw her on the 26th day of November? A. Yes, sir.

Q. In this photograph which has been shown you does the left hand side of the photograph represent the bow of the vessel? A. No, sir.

Q. Isn't the bow of the vessel in this direction (to the left)? A. Yes, sir; the bow of the vessel is way along here.

Q. Isn't the left hand side of the break on the side of the vessel next to the bow? A. That is towards the bow of the vessel.

Q. That is, the left hand side represents the forward? A. This is the fore end of the bridge.

Q. Then, as I understand, the left hand side of the break as shown in the photograph looking right at it is on the fore end of the fracture? A. Yes, sir.

Q. What is the thickness of the plates there, do you remember? A. I haven't got it down, but I suppose three-quarters or seven-eighths, along there.

Q. You mean the thickness of the iron of the plates? A. Yes, sir.

Examined by Mr. SHARP:

(768) Q. What was the question put to you by Mr. Hughes that you said was impossible under those conditions? A. What's that?

Q. State what the question was you answered by saying it would be impossible for a collision to occur in that way. What was the question put to you? A. These vessels?

Q. Just state what question he put to you that you answered in that way? A. I don't recollect the question now; only this vessel going with a port helm; the Plymothian going with a port helm and the tide running south.

Q. You mean going in any way? A. As these models show, sir.

Q. How did that question represent to your mind that the Victory was moving—what speed—any at all? A. He didn't state what speed.

Q. Your answer is, then, it would be impossible at any speed that she was making. It wouldn't make any difference what speed she was making? A. If she was standing still, this vessel, the Victory, was standing still, and the tide running so, and the Plymothian coming this way with a port helm. Why, I say it is impossible to strike this vessel.

Q. So, then, that accident might have happened if the Victory was standing still? A. No, sir; not if the Victory was standing still.

Q. What do you mean by that answer, then? A. Well, I don't understand you.

Q. Well, tell what you do understand? A. I just explained it there.

(769) You said you didn't understand from counsel's question what the speed of the Victory was. What did you suppose that speed to be when you gave the answer that it was impossible? A. It wasn't stated to me what speed she was going.

Q. Your answer would be the same whether she was going rapidly, slowly, or not at all? A. If she was going rapidly, slowly, or not at all? I don't see with the tide running so and this vessel coming up with a port helm, how this accident occurred.

Q. You don't think in that situation that the accident could have occurred at all? A. No, sir.

Q. That's my idea, that to the question as put by the counsel the proper answer would be no collision would have occurred in that situation. Your idea would be that no collision could have occurred? A. If this vessel (meaning the Victory) was going a great speed—going with any speed, and this vessel was crossing her bow of course there would be a collision if they were very close.

Q. You mean, then, if the Plymothian was crossing the bows of the Victory the accident would have happened in the way indicated by that diagram? A. If this vessel (the Victory) was in motion—if this Victory was in motion and this vessel was coming along across her bows and was close enough, of course, there must be a collision.

Q. Then, I understand, if the Victory was in motion and if the Plymothian was running across her bows, that diagram would represent the injuries sustained by the Plymo-

(770) thian? A. Yes, sir; if they were close enough to.

Q. Wouldn't the vessel be in motion that was moving with the tide even if her headway had been otherwise

checked? Wouldn't she be in motion if the tide was carrying her along? A. If the Plymothian was in motion?

Q. Wouldn't the Victory be moving if it was carrying her along even if the engines were not propelling her through the water? Wouldn't a two and a half knot tide carry the Victory along with it even if her engines were not helping the movement? A. Yes, sir.

Q. Well, your idea is, if the Victory was in motion at all, whether the motion was caused by the tide or her engines, that diagram would represent the wound, provided the Plymothian ran across her bows at that time? A. Well, if this Victory had been still and this vessel had come up close to her there would have been a collision then—run right up against her.

Q. If the Victory had been still that diagram would represent the injuries sustained, provided the Plymothian ran across her bows and struck her side against her bow? A. There would have been a collision, but this vessel going and that one still would have torn, in my opinion, this thing apart more—torn it back.

Q. Suppose the Victory and Plymothian would rebound by reason of the collision, would it tear it apart? A. What's that?

Q. If the Victory should rebound by reason of the collision, would it tear it more than that? A. Might do so, but not in my opinion to the extent it would was going so, (771) right along, and made a gap, and as she went along carried it still further. In other words, if the Plymothian was still and this other vessel ran into her and came out there would not be that damage that there would if the Plymothian was going ahead.

Q. You stated that it varied from a few inches to two feet? A. Yes; I say from two to three feet.

Examined by Mr. ROBERT HUGHES:

Q. Are you the same Captain Sanford that testified in the Sir William Armstrong case? A. The same person; yes, sir.

Examined by Mr. MYNDERSE:

Q. Do you know how long the Plymothian lay sunk on the beach before she was taken over to the dock? A. No, sir; I do not.

Q. Do you know how much water she took in? A. No, sir.

Q. Or how high it got into her? A. No, sir; I was only called upon the survey on the docking of the ship.

Q. The cargo was out of her then? A. The cargo was out of her.

Q. Do you happen to know what the effect would be in taking in water on cargo of compressed cotton that had been screwed into a vessel, whether the taking in of water would put a strain on the vessel through the swelling of the cotton? A. Not through any indications I had, but I would imagine the cotton would swell.

(772) Q. That would put a strain on the vessel? A. Yes, sir; on the bulkheads of the vessel.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. As I understand the answers to the questions propounded to you, it is your opinion that, if the Plymothian had been the moving vessel, the damage aft of the hole would have been greater? A. That is what I meant to convey; yes, sir.

Mr. WILLIAM H. QUIGLEY, JR., on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. Plase state your name, age, residence and occupation? A. William H. Quigley, Jr.; age 34; occupation shipwright, Newport News.

Q. How long have you been a ship-wright, and state your experience? A. I have been in the ship-building business now ever since I was 19 years old—between 15 and 16 years.

Q. Just state your experience, what yards you workod in and in what capacities? A. I first served my time on Beatty's Island, State of New Jersey; that was a wooden yard I had charge there off and on for four or five years; from there I worked in the Hillman's ship-yard in Philadelphia, worked for William Cramp & Sons, Neafy & Nevins, and at Newport News.

Q. And what position do you occupy at Newport News, (773) and how long have you been employed in that capacity? A. I have been there now three years and four months, holding a position as foreman of the iron hull department.

Q. Have you had much experience in the building and repairs of iron ships in the employment you say you have been engaged in? A. Yes, sir, I have had about, I suppose, eight years experience in the iron yard.

Q. Were you foreman in November, 1891, when the work

on the steamship "Plymothian" was done at your yard? A. Yes, sir.

Q. Please look at the photograph here handed you and state if that is a correct representa ion of the wound in the side of the Plymothiau and just describe to the court the nature of the injuries? A. I think that is a very good picture of the damage dene. Of course it don't show it so very plain; it is a very dark picture, it might show it a little bit plainer than it does, but I suppose on account of the day it was taken it is a little dark. We had a picture over there that showed it a little better than this, showed the frames that were broken.

The picture referred to is the one heretofore filed, marked "Photo. 4."

Q. Describe what frames were broken? A. I couldn't say exactly; I think about three frames broken and one or two fractured; but I wouldn't like to be positive because it has been so long ago, and we have so mane of these ships. I didn't make a note of them but I think there were three frames broken. I think there were between 8 and 10 plates (774) broken, that is, shell plates, and I think there were three or four beams and two or three stringer plates broken.

Q. What was the depth of the incision of the bows of the colliding steamer into the Plymothian? A. I wish you would speak a little louder, I am getting a little hard of hearing.

Q. What was the depth of the incision of the bows of the vessel in collision with the Plymothian? How deep, in other words, did the fracture extend? A. Well, this ship had a lower stringer plate that ran below her deck, and I judge the bow of the colliding ship went into that stringer place probably about, as near as I could judge, about 15 inches. It might have went an inch or two more or an inch or two less. Of course it went into that deeper than the above decks. I think there were two decks above that.

Q. Judging from the wound on the side of the Plymothian, could that wound have been caused by the Plymothian striking a stationery object or an object receding?

Question objected to on the ground that the witness has not qualified himself as an expert on such matters.

A. Well, I couldn't say that she could, because I should think that the Plymothian would have to come right in sideways to do it.

Q. In your opinion, then, was or was not the vessel in collision with the Plymothian making headway? A. Well, that of course I couldn't say, whether she was making any headway or not, but it looks to me as though she would have to be going ahead to go into the side of the Plymo-

thian, because I can't see how the Plymothian could come broadside and go into the bows of the colliding ship.

(775) CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. I understand you think the depth of the incision at the greatest point was in the neighborhood of 15 inches? A. I said about; it might not have been quite that much or it may have been a little more.

Q. Wasn't far from it—an inch or two? A. I wouldn't commit myself to that, because it has been so long ago since I repaired the work. I wouldn't like to say how much it was. I repaired that stringer plate, and I would say about 15 inches. I may be mistaken within an inch or two one way or the other.

Q. Did you ever have anything to do with the navigating of vessels? A. No, sir.

Q. Do you think you or anybody else could give any idea as to whether one or either of those vessels was in motion from that mere examination, without knowing how the tide was or what the speed of the vessels were or what their courses were? A. Understand me, I don't say I thought either one of them was in motion any more than of course I don't see how that vessel could come sideways and go into the bows of the colliding ship.

Q. She couldn't come sideways because vessels don't move that way? A. Couldn't come with such force.

Q. Do you think you can judge from the incision, in the first place, whether the vessel that struck that vessel was moving fast or slow, or anything about that accident, without knowing how the tide was or how the courses of the two vessels were or the angle at which they came together.

(776) Do you think any man, just from a little thing like that, could give any reliable idea as to the facts of that sort when he didn't see them? A. Probably if he knew which way the tide was coming he would have a little better idea, too, but of course we don't go into the tide business no more than the force of that blow. I don't see how that vessel could come sideways and go into her, although she might possibly have done it, but I can't according to my judgment—

Q. Suppose both vessels were moving slowly, and that the Plymothian was crossing the course of the Victory at a slight angle, not moving sideways, but crossing the bows of the Victory at a slight angle, could you say whether the injuries would not have been inflicted just as probably by a motion of that sort? A. Well, I don't think they could

have been going so very slowly for the Plymothian to go so far before the Victory would have struck her—you see she would have had to run a considerable distance. Of course I don't know the length of the Victory, but that fracture is somewhere in the neighborhood of the centre of the ship, so if they had both been going so slow they would have had to be going very slow to have got that far before she struck her, and I don't think—she struck her nearly at right angles. The blow was nearly about right angles.

The COURT:

Q. The notary has got you down that you don't think the blow was at right angles? A. It has been so long ago I (777) kind of forget, but this picture, and I looked at a picture before I left this morning and kind of freshened it up. The Victory, I think, went into her at about that angle (illustrating), as near as I can remember.

By Mr. ROBERT HUGHES:

Q. Do you call that a right angle? A. I didn't say it was a right angle.

By Mr. MYNDERSE:

Q. About how many degrees do you say were in there? A. I should say about 20 degrees, off from a right angle.

By Mr. ROBERT HUGHES:

Q. The angle between the bow of the Plymothian and the port side of the Victory would be an angle of about 70 degrees you think? A. About that, yes, sir.

Q. Then you think there was a slight slant of the vessels coming together? A. Yes, sir, I am satisfied of that. I think that was the angle of it.

Q. Not being a mariner yourself and not knowing anything about the handling of ships and not knowing the facts of this case, can you judge, whatever you judge to be the speed of the Victory, whether the Plymothian was moving or not? A. No, sir, I wouldn't like to say because I don't know. I don't know how I could say that, because there may be such a thing happen as the Plymothian did go into her; and I wouldn't say the opposite either.

Q. You couldn't tell about that? A. No, sir. I am not prepared to say that.

(778) RE-DIRECT-EXAMINATON.

By Mr. FLOYD HUGHES:

Q. Just state where that 15 inch incision was, whether it

was through wood or iron? A. Through iron—either iron or steel. I couldn't say just at present whether she was an iron or a steel vessel.

Q. And the width of that iron or steel—thickness, I should say? A. Well, I don't know as I could state the thickness, but I judge a half inch plate.

Examined by Mr, MYNDERSE:

Q. This plate lay horrizontally? A. Yes, sir.

Q. And the Victory not only cut through this horizontal plate 15 inches, but broke a number of frames and deck plates and side plates? A. It looks to me as if that plate was about here, the biggest gap, then she has a deck here (referring to photograph) and a deck here. This stringer plate runs through here as stiffening, and she cut right through that one into this one and into this, of course it cut into this one deeper than the others.

Q. Then she would go into the lower one deeper? A. Yes, sir.

Q. And there were three stringers she cut into? A. Yes, sir, but the upper one slightly.

Q. And the lower one 15 inches? A. About that.

Q. What was the depth of the hole that was cut into the (779) side of the Plymothian, can you recollect at all? A. You mean the plates that were broken?

Q. No, what was the width of the hole of the widest part? A. I should say about two feet—that is, the opening.

Mr. J. L. PEBWORTH, on behalf of the Victory, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. J. L. Pebworth; 38 this August; residence, Suffolk; engineer of the Virginia Dare.

Q. What position did you occupy in November, 1891? A. Engineer of the Virginia Dare.

Q. Were you on the Virginia Dare when she went down the river on the afternoon of the collision between the Victory and the Plymothian? A. Yes, sir.

Q. Where were you standing? A. At the after gangway.

Q. Describe how that gangway is in reference to your steamer? A. The engine-room is about amidships of the boat, and the gangway is just aft the engine-room, one on each side.

Q. Which side were you standing on? A. The port-hand when I first came out, and then I went around to the starboard side.

Q. At the time you were passing Lambert's Point and from that time to the collision where were you standing? A. On the starboard side, right-hand side of the boat.

Q. And that gangway is a little aft of amidships? A. (780) Yes, sir, pretty near the end of the boat.

Q. The Virginia Dare is a propeller steamer? A. Yes, sir.

Q. Did you see the Plymothian as she passed down the river, and if so, state where you first saw her? A. I saw her coming out from the pier as we were coming by there.

Q. Just go on and state the occurrences as you saw them? A. As we were coming out past the pier she was going out. We kept on a little while, and I heard one blast of the whistle, and it was answered by two by the steamer coming up the river. A little while after that one blast was blown again, and answered by two by the steamer coming up the river, and we got about abreast of the boat we passed her—

Q. You mean the incoming steamer? A. Yes, sir, passed the Victory, the one coming up. Of course, we were going along all that time, and about that time I went to the engine-room, and when I came back she was in collision. When I got back to the gangway she was in collision.

Q. You state you heard two whistles from the Plymothian before you went to the engine-room? A. Yes, sir.

Q. Each single whistles. Were they blown before you heard anything from the Victory or afterwards? A. The boat that was sunk, or the boat that was run into, blowed one whistle first.

Q. She blew the first whistle? A. Yes, sir, and it was answered by the other by blowing two.

(781) Q. How was that whistle in respect to distinctness? A. I heard it very distinctly, sir.

Q. It was loud and distinct? A. Yes, sir.

Q. What side of the river did the one that was sunk move down on, the east side or the west side or the middle? A. The east side of the river, sir, the right-hand side.

Q. After you heard the one whistle answered by two and the other whistle answered by two, I understand, you went into your engine-room? A. Yes, sir.

Q. And came back only in time to see the vessels go together? A. Yes, sir.

Q. Did you notice the speed of the Victory as you passed her? A. Yes, sir.

Q. How was she running? A. Seemed to be coming under full speed, and as she got abreast of us, if I am not mistaken, her engines were slowed down or stopped entirely, and then she went ahead again.

Q. What speed does the Virginia Dare make, or was she making at that time? A. About eight miles an hour or eight and a half.

Q. Do you remember the buoy? How close to the buoy did this collision happen, or did you notice? A. I didn't notice the buoy closely at all.

Q. How far were you from Craney Island when you passed the Victory? A. I don't know about the distance exactly, because I wasn't looking at the light-house at all; most of my attention while looking there was looking at the two vessels on account of the two whistles and didn't no-
(782) tice the light-house particularly at all.

Q. Had you noticed the second buoy before you passed the Victory, or could you place her at all in the river? A. She was between Lambert's Point and Craney Island when the accident happened.

Q. You could't exactly place her? A. I couldn't put her on the exact spot.

Q. Now as to the speed of the Plymothian, how was she moving? A. The one that was sunk?

Q. The one that was sunk. A. We had passed her and I couldn't tell what her speed was.

Q. You passed down the river as she was coming out? A. Yes, sir, coming out of the pier.

Q. Did you notice any whistles from this steamer before the ones you have testified to as answered by the Victory? A. She blowed one long whistle as she was coming out of the dock.

Q. Did you notice any other whistles before the other one you testified to? A. No, sir.

Q. You remember hearing the one long whistle? A. Yes. sir.

Q. And about where you then? Where was your vessel as she was moving out of the dock? A. I judge we were almost abreast of the pier, if not quite there.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

(783) Q. Were you on duty at the time? A. Yes, sir.

Q You were on the starboard side of the Virginia Dare, I suppose? A. Yes, sir.

Q. What time did you leave Norfolk that day? A. Well, that I couldn' tell you right now, sir, to save my life. We are supposed to leave Norfolk at 3 o'clock, and in the summer time at 4 o'clock, or as near as we can.

Q. You are the engineer, I believe? A. Yes, sir.

Q. Did you ever act as master or captain of a vessel? A. No, sir.

Q. What is the draft of the Virginia Dare? A. Five and a half feet.

Q. Do you know anything about that channel? A. No, sir.

Q. Ever have any occasion to learn anything about it as an engineer? A. No, sir.

Q. The Virginia Dare with that draft can go almost anywheres, can't she? A. No, sir; not anywheres. Wherever she has got water enough.

Q. She can go anywhere in water 6 feet deep? A. Have to have a little more than that.

Q. You heard one blast of the Plymothian answered by two? A. Yes, sir.

Q. And then heard another blast of the Plymothian, that answered by two? A. Yes, sir.

Q. And with the exception of the dock whistles that was all you heard? A. No, sir.

Q. What else did you hear? A. Four short whistles just (784) before they went together.

Q. From which boat? A. From the Victory—heard them distinctly.

Q. Well, as I understand, what you heard was one whistle from the Plymothian answered by two, and a second from the Plymothian answered by two, and four short whistles from the Victory? A. After awhile; yes, sir.

Q. Just as they were coming together? A. I don't know whether that was in answer to the other boat or not—just about that time.

Q. That is what you heard? A. Yes, sir; I heard four short whistles.

Q. What was in the mind of the man you don't know? A. No, sir, we were ahead.

Q. And that's all you heard? A. Yes, sir.

Examined by Mr. SHARP:

Q. Where was the Virginia Dare at the time of the collision? A. Between Lambert's Point and Craney Island, or just about Craney Island.

Q. Between buoy 7 and Craney Island? A. I don't know nothing about the buoys.

Q. Was she nearer to Craney Island or to Lambert's Point? A. Nearer Craney Island.

Q. More than half-way, then, between Lambert's Point and Craney Island? A. I judge she was when the collision happened.

Q. How much more? A. As I just told the gentleman

(785) just now, I wasn't looking on the side the light-house was on.

Q. You were going about eight and a half miles an hour? A. Yes, sir; about eight and a half.

Q. But you were a considerable distance from Craney Island, were you not, at the time of the collision? A. No, sir. I think we were near Craney Island if not abreast of it. I won't be positive about that, because I wan't on that side looking at the light-house.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You stated just now your judgment was you were about abreast of it? A. As near as I can get. I can't say positive about that, because I wan't on that side looking at the light-house.

Q. And, as I understand, after you heard the second of these whistles answered you went into the engine room? A. Yes, sir, and came right out.

Q. And then it was that you heard the four whistles of the Victory? A. Yes, sir.

Q. And that was just before the collision? A. Yes, sir.

Q. There was a little interval of time, then, between the last two whistles of the Victory? A. Certainly; a little interval between all the whistles.

Q. Did you hear anything from the Plymothian from the time the Victory blew her second whistles up to the time she blew her four whistles? A. I wouldn't say nothing (786) about that, because I wasn't noticing the Plymothian at that time. When the four were blown I had been in the engine room, and what the Plymothian had done I don't know, between the interval of my going into the engine room and coming back.

Q. Did you notice the speed of the Victory at the time of the collision? A. No, sir.

Q. Could you judge of the speed of the vessels, or were you too far off? A. I was too far off to judge about that.

RE-CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. Is your engine room on the main deck? A. Yes, sir.

Q. Then you had to step in a door— A. Had to walk about as far as from here to the post.

Q. You had to walk along the starboard side of the boat up to the engine room door? Yes, sir; the starboard side or the port side either.

Q. You were on the starboard side, were you? A. Yes, sir.

Mr. A. M. CHANNEL, on behalf of the Plymothian, sworn:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. A. M. Channel; 34; Suffolk; steamboat man.

Q. What position do you hold? A. Mate, sir.

Q. Mate of the Virginia Dare? A. Yes, sir.

(787) Q. How long have you been an officer of vessels? A. Since 1886.

Q. You are thoroughly acquainted with the channel of the Elizabeth river are you? A. I can come up and down it most any time.

Q. Go up and down it every day of your life? A. Yes, sir.

Q. What position did you hold in November 1891? A. Mate of the Olive.

Q. Did the steamer Olive pass down the river the evening two English steamers came into collision below Lambert's point? A. Yes, sir.

Q. And you were first mate at the time? A. Yes, sir.

Q. Just state to the Court whether you saw that collision and what you saw of it? A. As well as I remember now—it has been some time ago and I haven't thought much of it—I thought it was settled some time ago—we passed the Plymothian as she came out of the dock just about the first black buoy, I don't know whether is is 7 or 9, they change them so much.

Q. It was 9 then? A. We passed her about there somewheres, close to that buoy, left her on our starboard side, saw another steamer coming up, and we passed between them and gave the one coming up our port side, we always give them as much room as possible, them big fellows, anyhow.

Q. You passed the Victory port to port and left the Plymothian on your starboard quarter as you went down? A. Yes, sir, went between them.

Q. About where was the Victory when you passed her in (788) respect to Craney Island light-house? A. I think she was just abreast as well as I remember.

Q. What speed does your boat make? A. Making about ten miles an hour; that's her usual speed.

Q. And when you passed the Victory port to port she was about abreast of Craney Island light? A. Just about.

Q. What positien did she occupy in the channel, the west

middle or east side? A. She looked to me she was just about as close on Craney Island as she ought to have been.

Q. On the western side as close to the light-house as she ought to have been? A. Yes, sir, that is, the Victory.

Q. Did you notice how the Plymothian moved, with reference to which side of the channel she came down? A. Hugging the black buoys pretty close.

Q. That is, she kept down on the eastern side? A. Yes, sir.

Q. Did you hear any of the whistles blown by those vessels? A. I heard them but I don't know that I could swear to them or not. It has been so long.

Q. You heard both blow but you can't tell which blew which? A. No, sir, not at this time.

Q. Did you hear whistles from the Plymothian? A. I heard whistles from them both.

Q. How were those whistles in respect to distinctiveness? A. I heard them plain enough—both boats.

Q. But at this late period you can't remember what whistles you heard from the Victory or from the Plymothian? A. No, sir.

(789) Q. What speed was the Victory making when you first saw her? A. I don't remember much about her speed, how she was coming up.

Examined by Mr. MYNDERSE:

Q. When you say the Victory was as close as she ought to be to Craney Island; what do you mean, as close as she could get considering her draft? A. She might have gone a little closer, but she was about as close as them vessels run over on that side.

Q. Well in towards the light? A Yes, sir.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. What kind of a steamer is the Olive? A. A little passenger steamer—propeller steamer 120 feet long.

Q. Running to Suffolk? A. Yes, sir—she don't run there now. She used to.

Q. She did then? A. Yes, sir.

Q. What's her draft? A. Seven and a half feet.

Q. As I understand, you passed the Victory about abreast of Craney Island? A. Yes, sir.

Q. Where were you when you heard the whistles? A. Just passed the Victory.

Q. Then you were below Craney Island when you passed

the Victory? A. No, sir, we passed her about Craney Island.

Q. I mean when you heard the whistles? A. Yes, sir,
(790) below the light-house. Just had passed the Victory.

Q. Where were you yourself? A. I was in the pilot house.

Q. I suppose the pilot house on the Olive is like it is on all other boats, in front of it? A. Yes, sir.

Q. And were you in charge of the navigation? A. The captain was with me—we were talking.

Q. You were at the wheel? A. Yes, sir.

Q. Navigating the vessel? A. Yes, sir.

Q. Looking ahead? A. Yes, sir.

Q. And taken up with the navigation of your vessel. I suppose? A. Yes, sir.

Q. Was anybody else on the lookout on your vessel but you? A. The captain was in the pilot house, too, sir.

Q. At that place and that far down and looking down the river can you swear with any certainty whether any whistles you heard came from the Plymothian or what they came from? A. I wouldn't swear to it, but I am satisfied I heard whistles from both of the steamers.

Q. Did you notice any tugs around Lambert's Point as you passed? A. I don't know as I did. There was usually a lot of them around there.

Q. You don't know whether they were blowing or not? A. No, sir.

Q. If they had been you would have been as apt to have heard them as the Plymothian? A. As apt to have heard them, but I could tell them.

Q. Do you know the whistle of the Plymothian? A. I
(791) know it is different from our whistles.

Q. Did you turn off on the flats? A. Yes, sir, just at the red buoy below the light-house.

Q. When you passed the Plymothian was she just about off the buoy at Lambert's Point? A. Yes, sir.

Q. Straightened her course down in the channel? A. Just straightening when we passed her.

Q. Did you notice her any time after you passed her, with your boat's head the other way? A. Not until they got together.

Q. So the only two points you noticed the Plymothian, you being in your pilot house and looking ahead, were as she passed buoy 9 and as they came together? A. Yes, sir.

Q. And you don't know of your own knowledge how she went between those two points? A. No, sir, but I think she was heading down on the eastern side.

Q. But you didn't see it? A. No, sir.

Examined by Mr. SHARP:

Q. You say you think the Victory was heading down the eastern side of the channel? A. No, sir, the Plymothian.

Q. Where were you at the time of the collision? A. Just turned the buoy to go off on the flats below Craney Island.

Q. How far is that from Craney Island? A. About a quarter of a mile, I should judge.

By the COURT:

(792) Q. That's the first red buoy, isn't it? A. Yes, sir.

RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. You say the Plymothian when you saw her was straightening down the channel? A. Yes, sir.

Q. And was then on the eastern side close to the buoy line? A. Yes, sir, looked to me like she was hugging the buoys pretty close.

By Mr. ROBERT HUGHES:

Q. She wasn't hugging but one buoy at a time? A. No, sir.

Counsel for the Victory offered in evidence U. S. Coast Survey chart No. 400.

Counsel for the cargo offered in evidence pilot rules No. 2 and No. 3, which read as follows:

"Rule II. When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistles shall be given and answered promptly, as in that case specified."

"Rule III. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by (793) giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

And "The Third Situation," which is as follows:

Third Situation.

A and B will see each other's red light only, the screens preventing the green lights from being seen. Both vessels are evidently passing to port, which is rulable in this situation, each pilot having previously signified his intention by one blast of the steam whistle.

Court then proceeded to hear the arguments until 6 P. M., when it adjourned until to-morrow, Tuesday, May 15th, at 9:30 A. M.

At 9:30 A. M., Tuesday, May 15th, 1894, Court met.

Present: Hon. Robert W. Hughes.

The argument was continued until 10:30, when Captain S. A. HARNEY, a witness on behalf of the Plymothian, was (794) sworn, and testified as follows:

Examined by Mr. FLOYD HUGHES:

Q. State your name, age, residence and occupation? A. S. A. Harney; 36; Hampton; steamboating.

Q. Are you master of the "Luray?" A. Yes, sir.

Q. And were so in November, 1891? A. Yes, sir.

Q. Did you pass down the channel of the river in November, 1891, on the day the two English steamers, Victory and Plymothian, came into collision? A. Yes, sir.

Q. State if you remember how you passed the Victory, and where? A. Well, now, I passed what we call a tramp steamer on the port-hand just after passing Craney Island.

Q. An incoming steamer? A. Yes, sir, left her on the port-hand. I don't remember whether she was a white or black steamer, or her name.

Q. The facts of the collision you know nothing of? A. Know nothing of it; I had passed by it.

Q. What was the speed this vessel was making; could you approximate it? A. No, sir, about the usual speed they come up. When they get up about there they slow down, of course, and I should say she was going about five miles an hour, something like that, I am not sure; It has been a long time, and I can't remember as far back as that accurately, but that's about the usual speed.

Q. How did you pass down the channel in respect to the east, middle or western line? A. I was on the east side, on the starboard hand going down.

(795) Q. And how was the Victory? A. I presume she was about in the middle of the channel—might have been a little on the starboard hand. By my leaving her on the port I judge she must have been a little on the starboard side of the channel coming up.

Q. On her starboard side of the channel? A. Yes, sir.

Examined by Mr. MYNDERSE:

Q. This was on your afternoon trip? A. No, sir; this was on the morning trip, I think. I don't remember now. I don't know whether it was afternoon or morning.

Q. You heard of the collision afterwards? A. Yes, sir; I saw the steamers afterwards.

Q. It was on the trip just preceding the collision? A. Yes, sir.

Q. You passed only one incoming tramp steamer at that place? A. I think that's all. I can't remember two years back much about it. I didn't give it any attention, you know, at the time, until afterwards.

CROSS-EXAMINATION.

By Mr. ROBERT HUGHES:

Q. As I understand, you commanded the Luray at the time? A. Yes, sir.

Q. What is the draft of the Luray? A. Five or six feet.

Q. Where were you bound first that day, to Old Point? A. Yes, sir

Q. You always go to Old Point first and then to Hamp-
(796) ton? A. Yes, sir.

Q. You were not going across the flats to Newport News then? A. No, sir; I was going down the channel.

Q. What day was it, Captain? A. I can't tell you, sir.

Q. What month? A. I forget now. I heard Mr. Hughes say, but I forget.

Q. I want to know your recollection? A. I don't remember.

Q. You don't remember the month? A. No, sir.

Q. Or the day? A. No, sir.

Q. And you didn't see the name of the steamer you passed? A. No, sir.

Q. And in the fall of the year—in October, November or December—it is almost a daily practice to pass tramp steamers coming in for cotton and other merchandise, is it not? A. I think so; we pass three or four a day sometimes.

Q. And on this occasion you can't remember the day you passed this steamer and didn't notice her name, and can't even remember clearly whether it was on your morning or evening trip? A. Yes, sir; it was the evening trip, I think.

Q. Why? A. Because I found this vessel when I came back the next morning. I think that was on the evening trip.

Q. You mean you found the vessel you had passed that day? A. No, sir; found the other one that she had collided with on the flats.

Q. Do you know the one you passed had any collision at all? A. No, sir; that's only hearsay. I wasn't there at all.

Q. You don't know whether it was that vessel or an-
(797) other? A. No, sir; nor whether it was a white one or a black one, as far as that's concerned.

Q. Where was it you passed her? A. Between Boush's Bluff and Craney Island, nearer Craney Island.

Q. Below Craney Island? A. Yes, sir.

Q. And you think the one you saw was proceeding about five miles an hour? A. Yes, sir; I should think so. I didn't pay much attention to it.

Q. And I understand you to say she was about the middle of the channel, or perhaps a little on the starboard side? A. Yes, sir; I think so.

Q. But very near mid-channel? A. Yes, sir.

Q. And that was below Craney Island, in the direction of Boush's Bluff buoy? A. Yes, sir.

Q. Can you remember the year when this was? A. '91, I believe.

Q. You say you believe? A. No; I couldn't remember; I never made any note of it. I don't know whether it was five years or two years.

Q. Can you remember the day of the week? A. No, sir.

Q. Then, you can't remember the month, week or day of the month, and can't remember the day of the week and didn't notice the name of the steamer? A. No, sir; I didn't see any name on her.

Q. And you pass frequently three or four tramp steamers a day? A. Yes, sir.

(798) RE-DIRECT-EXAMINATION.

By Mr. FLOYD HUGHES:

Q. Were you ever interviewed by any of the counsel in this case shortly after the collision?

Question objected to and objection overruled.

A. Mr. Sharp, I don't know whether he was counsel in this case or not, asked me which side of the river I passed this steamer on and I told him just as I stated here—

Mr. HUGHES:

I don't care for what you stated to him.

By the Court:

Q. You had some conversation with Mr. Sharp about it? A. That's all; he just asked the question, sir.

By Mr. FLOYD HUGHES:

Q. I just want to know if you had an interview with him? A. Yes, sir; had an interview.

Q. And that was shortly after the collision? A. Yes, sir; a few days, perhaps a week; I don't remember.

By Mr. ROBERT HUGHES:

Q. Can you remember whether that interview you speak of was in reference to this case or some other case of the Old Dominion or some other general case? A. I think it was in reference to this case.

Q. Do you remember that, or are you giving it as a mere opinion? A. I remember that. I couldn't remember anything only for that.

EXTRACT FROM ANSWER OF S ELCOATE, MASTER, FILED DECEMBER 11TH, 1891, TO LIBEL OF RALLI BROS. ET AL.

(799)

The true history and statement of the aforesaid collision is a follows:

(Before presenting it mention is made here that the buoy No. 22, heretofore mentioned in the pleadings and depositions in this cause, has recently been numbered 24 on the new charts recently issued by the United States government. It is the buoy generally designated as the Merrimac buoy. It is still the only red buoy between Craney Island and Lambert's Point. Its position has not been altered. And it is situated on the western side of the ship channel, perhaps 1,400 yards south of Craney Island. Hereinaftes it will be called the Merrimac buoy.)

About 3:30 o'clock P. M., November 12th, 1891, the Victory, in charge of the respondent as master, hove anchor in Hampton Roads and started for Norfolk. Shortly before passing Craney Island, she was slowed down and proceeded at a slow speed on the eastern side of the main ship channel in order to avoid certain vessels which were meeting her and which she passed starboard to starboard. During the entire voyage this respondent and a licensed Virginia pilot were on the bridge. She is steered by steam, the wheel being on the bridge and the machinery underneath. The third officer of the ship, who is an accomplished seaman, was at the wheel. He is generally stationed there and is assigned to that duty when entering and leaving a port from consideration of abundant caution. For the same reason, the master of the Victory is stationed as lookout when entering or leaving a port with a licensed pilot on board, specially attending to her navigation under the master's direction.

During the entire voyage, this respondent as master and

(800) as lookout, and the licensed Virginia pilot, and the 3rd officer of the Victory, were near each other on the pilot bridge, in close communication with each other, the master keeping a vigilant and constant lookout from the best point of observation on board, and reporting as such to the pilot, who was specially occupied in navigating the ship and directing the helmsman, which helmsman took orders from the pilot during said entire voyage, the master approving all acts of the pilot and therefore not intervening at any time to change his orders. The Victory being 324 feet long, and of heavy draft, was confined to a comparatively narrow channel. At the time she was light, being inward bound for a cargo. She was then drawing ten feet of water forward, and seventeen feet four inches water aft.

She is an iron steamer of 2,778 gross and 1,774 net register tonnage, built in 1882, and at the time of the collision was tight, staunch and strong, and in every respect, well-manned, tackled, apparelled and appointed, and having the usual and necessary complement of officers and men, all of whom were properly stationed and diligently attending to their several duties.

The weather was fine, the tide flood, and the wind light from S. W. Soon after passing Craney Island and when about quarter of a mile (by estimation) southward of the light-house, and while moving in the eastern part of the main ship channel, and keeping about forty yards westward from the eastern line of said channel, a steamship was observed on the western side of the channel near the said (801) Merrimac buoy, moving northwestwardly and apparently bound down the river. At the time said steamship, which afterwards proved to be the Plymothian, was sighted by this respondent, she was above the Merrimac buoy distant from it south to north about 340 feet (by estimation), and apparently about $\frac{3}{4}$ of a statute mile off, and bearing about two points off the starboard bow of the Victory, which was then moving nearly parallel with the buoy line on the eastern side of the ship channel. The Plymothian continued to move down the western side of the channel, passing the Merrimac buoy and shutting out the view of it from the Victory. When the Victory was, by estimation, about 550 or 600 yards north of said buoy No. 7, two loud, clear and distinct blasts of her steam whistle were blown to the Plymothian. No signal was heard on the Victory from the Plymothian, before or after the Victory sounded to her the said two blasts, except that very soon after they were sounded this respondent saw steam coming from her pipe, ond about fifteen seconds afterwards he heard a faint sound

as if coming from the steam whistle, and he also saw steam coming from the pipe.

Thereupon two whistles, loud, clear and distinct, were shortly afterwards sounded by the Victory to the Plymothian.

The attempt at whistling on the Plymothian was so imperfect and it was heard so differently by different persons on the Victory, and conveyed no reliable intelligence to any on the Victory. This respondent received from it merely an intimation that it was a signal of two whistles, and he took it to be so. It was an uncertain sound. It was not a (802) reliable signal. And no attempt apparently was made on the Plymothian to answer the two blasts which the Victory's steam whistle repeated, as before mentioned.

And the persons navigating the Plymothian did not respect either of said signals, two blasts each, that were sounded to her from the Victory. Instead of continuing to move down the western part of the ship-channel, and keeping the Victory on her starboard side, the Plymothian ported her helm, and heading about north-north-east as a consequence of such change, commenced to swing across the channel, without slackening her speed and without attempting to do so, until the steamers were distant from each other not more than two lengths of the Victory, at which time the helm of the Plymothian was still further ported, and thereafter she moved towards the Victory and heading about northeast up to the collision, which was caused by the Plymothian falling heavily and rapidly against the stem of the Victory, which was then moving backwards slowly and away from her.

The Plymothian was near the Merrimac buoy when the Victory sounded to her the first set of whistles, that is, two blasts together.

About half a minute elapsed before the signal was repeated by the Victory.

Shortly after sounding the second signal (two blasts together) to the Plymothian, this respondent, then acting as lookout, reported to the pilot that the Plymothian had ported her helm. That report was made by this respondent promptly after the Plymothian gave perceptible intimation (803) of her change of course. At the time her helm was ported, and her course changed from north to north-northeast, she was about four points off the starboard bow of the Victory.

Half a minute elapsed after the second set of whistles was sounded from the Victory, before the Plymothian was discovered by this respondent, or by any person on the Victory, to be moving under port helm.

She must have commenced to port her helm almost immediately after the second set of whistles was sounded from the Victory to her.

The pilot on the Victory had not heard one or two blasts from the Plymothian, but he had observed steam coming from her pipes. When the Victory sounded her second set of whistles to the Plymothian, that is, repeated the two blasts, half a minute elapsed thereafter, when this respondent, observing then the Plymothian beginning to change her course under port helm, reported to the pilot "the ship has ported her helm," and the pilot said in reply "Captain, I cannot port, I will run over that schooner," which schooner was then off the starboard bow of the Victory, moving down the eastern side of the ship-channel very slowly against the tide and the little wind—which schooner was abeam the Victory at the time of the collision, and then to westward of her and very near. Just ahead of that schooner two others had previously passed, each of them having moved between the middle line of the channel and the path of the Victory and very close to her. All those schooners tended to keep the Victory in the eastern side of the channel. Before reaching Craney (804) Island, less than half mile north of it, the steamer Louise, passing down the ship channel, gave a signal of two blasts to the Victory, which replied with two, they passing to starboard of each other. And so signalled the steamer Acomac almost abreast of Craney Island to the Victory, and so the Victory replied to her, and each passed starboard to starboard. And within a quarter of a mile above Craney Island a tug so signalled to the Victory, and so the Victory replied to her, and each passed starboard to starboard. Those steamers passed down the west side of the channel nearer its middle line than its western line. It was their signals which required the Victory to keep in the eastern part of the channel. And it was the schooners that hemmed in the Victory between their pathway and the eastern line of the channel, and compelled her to keep close to such eastern line. Some of them passed so near to her, the Victory had to put her helm slightly a-starboard to avoid colliding with them; her helm was righted promptly afterwards. The first and second of them were in position to keep the Victory from porting her helm, if she had desired to do so, at or before the Victory sounded her second set of whistles. The hindmost of them was in position to render very dangerous any porting of the Victory's helm after the Plymothian commenced to change her course under port helm. At no time was it practicable for the Victory to pass between any two of those schooners without colliding

with one of them. To have ported her helm, after the Plymothian commenced movement across the channel, toward buoy No. 7 or toward the Victory, would have resulted in (805) her sinking that third schooner and probably drowning or otherwise killing her crew. And to have starboarded her helm after sighting the Plymothian would have necessarily led to stranding the Victory on the eastern side of the river.

The situation as made by the Plymothian, was such that the Victory could do nothing towards averting a collision with the Plymothian, except to reverse the engines of the Victory, and to sound the danger signals, from the time the Plymothian commenced to leave the western side of the channel. The danger signal, three blasts of steam whistle, were sounded from the Victory, clear, distinct and loud, to the Plymothian, and as soon as she commenced her movement across the channel towards the Victory and her path.

And at the same moment, to-wit: about four minutes or more before the collision, the engines of the Victory were reversed "at full speed astern", and during all that time of four minutes or more were reversed and backing at full speed; and the Victory, in consequence thereof, ceased to move ahead, and was actually moving backwards through the water, and perhaps over the ground, at the time of the collision. Meanwhile, during these four minutes and more, the Plymothian, in violation of law which imperatively required her to continue to move down the western side of the channel when practicable, she being in it and about four points off the starboard bow of the Victory at the time of such mischievous and unlawful change of course, continued to move across the channel towards buoy No. 7, at an average speed of more than three miles an hour, and to throw (806) herself heavily against the stem of the Victory, the angle of incidence being less than ninety degrees, but this respondent has not yet ascertained how much below 90 degrees it was.

After the striking, the Plymothian's headway not being stopped by the severe and heavy collision, she fouled buoy No. 7 and passed beyond it. The backward motion of the Victory enabled the Plymothian to pass across her bow and prevented the collision from inflicting a more serious damage to the steamer. But the Victory soon disengaged herself, promptly passing astern, and receiving wounds only a short distance abaft her stem. But the momentum of the Plymothian's movement, due to her weight and speed, was such as in a very short time was such as to drive one of her large iron plates clear through both sides of the Victory,

from starboard to port. It wedged behind one of the iron frames on the port side and forced out the plates covering the frames a few feet abaft the stem.

All that was possible to avert the collision and to ease the shock was done on the Victory.

She was entitled to continue in the eastern side of the ship channel, even if she had heard a loud whistle from the Plymothian notifying her that she claimed to pass down such eastern side of the channel. And it would not have been possible to leave the eastern line of the channel, even if the Plymothian had unmistakably signalled her so to do.

No such signal was sounded or heard.

The Victory did all that was right, lawful, and possible, (807) and the persons navigating the Plymothian did wrong, and made the collision inevitable, by porting her helm about four or five minutes before the collision, and by failing to starboard her helm shortly after such porting began, and by not reversing her engines until she got within a ship's length of the Victory. The steam-whistle of the Plymothian did not work properly. It was the duty of the persons navigating the Plymothian to sound danger signals, and to back her promptly after they heard the whistles from the Victory and chose to regard them, however erroneously, as cross signals.

They were not cross signals. They were the first whistles that either steamer sounded to the other. But as the master of the Plymothian claims to have received cross signals from the Victory, it was his duty to have taken the legal precautions in such condition to correct mistakes and to prevent collision. A danger signal from the Plymothian may have been attempted, but it was not given. If attempted, it was then too late. Her engines were reversed when the collision was inevitable.

The defective work of the steam-whistle of the Plymothian may tended to lull the fears of the navigators on her; but it was her unlawful movement across the channel, at a time when the Victory could not safely port or starboard her helm under any pressure of whistles, that caused and occasioned the collision. And no fault, no mistake, no error of omission or commission on the part of the owners of the Victory, or of her pilot or of any one of her officers or crew, was committed.

(808) The owners of the Victory have taken steps to contest their liability, and that of the said steamer, for such collision in limited liability proceedings in this court, and pray that this case be consolidated with said proceedings.

STEPHEN ELCOATE,
Master SS. Victory.

Subscribed and sworn to before me this 11th day of December, 1891.

H. S. ATKISS,
U. S. Commissioner.

EXTRACT FROM ANSWER OF ALLEN MARDON, MASTER, FILED DECEMBER 3RD, 1891, TO LIBEL OF S. ELCOATE, MASTER.

(809)

That on the afternoon of the said 12th day of November, 1891, that said steamship Plymothian, whereof your respondent is and was master, was lying on the north side of the coal pier at Lambert's Point, where she had just completed coaling, being bound on a voyage from Galveston, Texas, to Liverpool, England, laden with a large and valuable cargo of cotton, consisting of about 3,682 bales, *via* Norfolk, Virginia, for coal.

That said steamship Plymothian is and was an iron steamer of 1,578 gross and 1,016 net register tonnage, 260 feet long, and on the day and year aforesaid was tight, staunch and strong, well manned, tackled, apparelled and furnished, having the usual and proper complement of officers and men, who at the times hereinafter mentioned were properly stationed and skilfully and diligently attending to their and each of their respective duties.

That said steamer, having completed her coaling as aforesaid, on the afternoon of the day and year aforesaid left

(810)

said coal pier at Lambert's Point in the due prosecution of said voyage, and proceeded, with your respondent and a skilful and licensed Virginia pilot on the bridge, and the other officers and crew properly stationed, down the Elizabeth river.

That in the due prosecution of her said voyage she passed close to the westward of buoy number 9 under a port helm, it having been previously put hard-a-port; that her course was then continued slowly along the eastern side of the ship channel, her proper course; that the tide was strong flood against her. Almost immediately after clearing said buoy number 9, a steamer was observed in the Elizabeth river coming up, and almost abreast of Craney Island light-house, at a rapid speed. This steamer afterwards proved to be the Victory. One blast of the Plymothian's steam whistle was instantly sounded, which was loud, clear and distinct, and should have been easily heard. No response was given by the Victory to it, however. This signal was twice repeated at short intervals of time before any answer was sounded by the Victory, and then the cross signals of two whistles were heard, to the great surprise

and astonishment of those navigating the Plymothian. In the mean time the Plymothian had been proceeding slowly down the eastern side of said channel, and the Victory up the centre of said channel rapidly until she sounded said twe blasts, when her helm was put hard-a-starboard and she headed directly across the track of the Plymothian. Immediately after these signals had been heard from the Victory, the engines of the Plymothian were stopped and reversed full (811) speed, the danger signal sounded, the helm put hard-a-port, and everything done that was possible to avert the collision, now inevitable. The Victory also sounded danger signals and reversed her engines, but not in sufficient time, as she continued to approach under her said starboard helm and came into the Plymothian with much force, striking her just abaft of her bridge and doing her great damage. At the time of said collision the headway of the Plymothian had been entirely checked.

That immediately after the collision, perceiving that his vessel was about to sink, your respondent rang up his engines and proceeded as rapidly as possible to beach his vessel on the flats on the east side of the Elizabeth river, where, with her large and valuable cargo, she soon settled on the bottom, though in shallow water.

The collision occurred immediately to the southward of buoy number 7 and at a short distance therefrom in the eastern edge of the main ship channel, and was in no manner nor to any extent caused by the negligence, fault, or want of skill on the part of those navigating said Plymothian, but entirely and exclusively occasioned by the negligence, omission, and want of skill on the part of the navigators of said Victory.

Eighth. That all and singular the premises are true.

Wherefore the respondent prays that the court would be pleased to pronounce against the libel aforesaid and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

ALLEN MARDON,
Master.

Sworn to before me this 3rd day of December, 1891.

H. S. ACKISS,
U. S. Comm'r.

Filed Dec. 3, '91.

EXTRACT FROM ANSWER OF ALLEN MARDON, MASTER, TO LIBEL OF RALLI BROTHERS, ET AL., FILED DECEMBER 28TH, 1891.

(812)

That on the afternoon of the said 12th day of November, 1891, the said steamship "Plymothian," which is a British

vessel, as aforesaid, and whereof your respondent is and was master, was lying on the north side of the coal pier at Lambert's Point, where she had just completed coaling, being bound on a voyage from Galveston, Texas, to Liverpool, England, laden with a large and valuable cargo of cotton, consisting of about 3,682 bales, viz Norfolk, Virginia, for coal. That said steamship "Plymothian" is and was an iron steamer of 1,578 gross and 1,016 net register tonnage, 260 feet long, and on the day and year aforesaid was tight, staunch and strong, well manned, tacked, apparelled and (813) furnished, having the usual and proper complement of officers and men, who at the time hereinafter mentioned were properly stationed and skilfully and diligently attending to their and each of their respective duties.

That said steamer, having completed her coaling as aforesaid, on the afternoon of the day and year aforesaid, left said coal pier at Lambert's Point, in the due prosecution of said voyage, and proceeded with your respondent and a skilful and licensed Virginia pilot on the bridge, and the other officers and crew properly stationed, down the Elizabeth river. That in the due prosecution of her said voyage she passed close to the westward of buoy number 9, under a port helm, it having been previously put hard-a-port; that her course was then continued slowly along the eastern side of the ship channel, her proper course; that the tide was strong flood against her. Almost immediately after clearing said buoy number 9 a steamer was observed in the Elizabeth river coming up, and almost abreast of Craney Island light-house, at a rapid speed. This steamer afterwards proved to be the Victory. One blast of the Plymothian's steam-whistle was instantly sounded, which was loud, clear and distinct, and should have been easliy heard. No response was given by the Victory to it, however. This signal was twice repeated at short intervals of time before any answer was sounded by the Victory, and then the cross signal of two whistles was (814) heard, to the great surprise and astonishment of those navigating the Plymothian. In the meantime, the Plymothian had been proceeding slowly down the eastern side of the channel, and the Victory up the centre of said channel rapidly, until she sounded said two blasts, when her helm was put hard-a-starboard, and she headed directly across the track of the Plymothian.

Immediately after these signals were heard from the Victory the engines of the Plymothian were stopped and reversed full speed, the danger signal sounded, the helm put hard-a-port, and everything done that was possible to avert the collision, now inevitable. The Victory also sounded

danger signals and reversed her engines, but not in sufficient time, as she continued to approach under her said starboard helm, and came into the Plymothian with much force, striking her just abaft of her bridge, and doing her great damage. At the time of said collision the headway of the Plymothian had been entirely checked.

That, immediately after the collision, perceiving that his vessel was about to sink, your respondent rang up his engines and proceeded as rapidly as possible to beach his vessel on the flats on the east side of the Elizabeth river, where, with her said cargo, she soon settled on the bottom, though in shallow water.

The collision occurred immediately to the southward of buoy number 7, and at a short distance therefrom in the eastern edge of the main ship channel, and was in no manner, nor to any extent caused by the negligence, fault, or (815) want of skill on the part of those navigating the said Plymothian, but entirely and exclusively occasioned by the negligence, omission and want of skill on the part of the navigators of the said Victory.

Seventh. Your respondent admits that said cargo was wetted and damaged by reason of said collision; that salvage expenses were necessarily occasioned thereby, and that unavoidable delays in said cargo reaching its destination have been and will be incurred. He denies, however, that the amount of said damages and costs will be $22.50 per bale, amounting in the aggregate to $80,000.00, or anything at all approaching that large sum, and calls for strict proof thereof. He again denies that the Plymothian is in any way answerable therefor, and therefore says that demand for the same was properly refused.

Eighth. Your respondent is ignorant of the matters and things stated in the 18th article of said libel, and calls for strict proof thereof.

Ninth. He admits that the statements of the 19th article are true; but denies that all and singular the premises of said libel are true as above set forth.

Tenth. And further answering, this respondent (without admitting that said collision and the damages arising therefrom were occasioned in any manner or to any extent, by fault, negligence or want of skill on the part of the navigators of said Steamship "Plymothian," but expressly insisting that the same were caused entirely and exclusively by the negligence and recklessness on the part of those in charge of and (816) navigating said steamship "Victory") says that, even were the same occasioned by the negligence, default or error in judgment of those navigating the said "Plymothian," said steamship would not be responsive in damages

to the shippers, owners or underwriters of said cargo; that, as will appear by the contract of shipment itself, "all loss "or damage occasioned by collisions, stranding, or other "accidents of navigation of whatsoever kind (even *even* "when occasioned by the negligence, default or errof in "judgment of the pilot, master mariner or other servants "of the ship owners, not resulting, however, in any case "from want of due diligence by the owners of the ship or "any of them, or by the ship's husband or manager)," was expressly excepted as a risk that the ship and her owners would not undertake; that, if thus occasioned, it in no way resulted from want of due diligence on the part of the owners of said ship or any of them, or by the ship's husband or manager.

That the said contract of shipment contained the further provision that said contract should be governed by the law of the flag of the vessel carrying the goods; that said vessel was a British vessel sailing under the British flag as aforesaid and shat said contract is to be governed by the laws of Great Brittain, which have uniformly sustained the validity of such provisions.

That in accepting said bills of lading or contract of shipment for said cotton, the shippers, owners and consignees (817) thereof, and the holders of said bills of lading, and all and each of them, agreed and contracted to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shippers, owners, consignees or holders respectively.

And your respondent is advised, and therefore charges, that the libellants and all and each of them, should they prove to be shippers, owners, consignees of said cotton, or holders of said bills of lading, or persons subrogated to their rights, are estopped by the contract of shipment itself from recovering for their alleged damages and costs, as against the said steamship "Plymothian."

Eleventh. That all and singular the premises are true.

Wherefore, your respondent prays that the court would pronounce against the libel so far as the same makes claim against the said steamship "Plymothian" and her freight, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

ALLEN MARDON, Master, &c.

WHITEHURST & HUGHES, Proctors.

Subscribed and sworn to before me this 28th day of December, 1891.

Seal.

H. S. ACKISS,
U. S. Commr.

(818) **OPINION.**

Filed Sept. 1st, 1894.

STATEMENT.

On the 12th day of November, 1891, the steamers Victory and Plymothian came in collision in the Elizabeth river, between Lambert's Point and Craney Island Light. It was in broad daylight at 4:14 P. M. of a clear day.

At the time of collision the Victory was bound in ballast from Hampton Roads to Norfolk. The Plymothian was bound to sea; having left Galveston, November first, with a cargo of cotton, bound to Liverpool; and having, in the prosecution of that voyage, come in through Hampton Roads and taken coals at Lambert's Point, Norfolk.

By the collision, the port side of the Plymothian was cut below the water's edge near amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and he cargo was much damaged.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability. The value of the Victory has been appraised at $67,500, and her owners have given stipulation for that amount.

The value of the Plymothian has been appraised at $33,350, and the value of her freight at $11,871, making a total of $45,221, which is to be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. The amount of her owner's liability will therefore be about $40,000.

In response to citations issuing in these proceedings, the damages arising out of said collision have been assessed. Those sustained by the owners of the Victory have been assessed at about $14,500. Those sustained by the owners of the Plymothian have been assessed at about $42,000; and the damages sustained by the owners of the Plymo-
(819) thian's cargo have been assessed at about $72,000.

In stating what I conceive to be the facts of this case, derived from a huge mass of conflicting testimony, I shall be in frequent conflict with evidence given on one side or the other in the case. Owing to the unusual volume of this evidence, it will be impracticable for me to analyze the statements of witnesses as to each fact, and to show why any fact which I have stated has been adopted. The task would be great and its execution tedious, and it has been rendered unnecessary by the unusually elaborate and able discussions of the evidence which have been submitted by counsel on either side in their briefs.

The Victory, Elcoate, master, was an iron ship of 1,774 net tonnage, 338 feet in length, 38½ in breadth, with 17 feet aft and 13 feet forward of draft. She had on 400 tons of water ballast and 550 tons of coal. Her number of officers and crew was 31.

The Plymothian, Mardon, master, was 260 feet long, 1,016 tonnage net, had a crew all told of 21 men, and had a cargo of 3,682 bales of cotton. She responded with exceptional facility and promptness to her helm.

The two vessels were actually navigated by their respective pilots, Nelson on the Victory, and Henley on the Plymothian. The masters of the two vessels were each on the bridge with the pilot, each acting as lookout, and seeing that the orders of the respective pilots were executed. Neither ship had a special lookout forward of the bridge in her bows. Several members of each crew were examined as witnesses in the case. All were respectively offered and ready to be examined.

(820) The collision occurred close upon what is now black buoy 7, which marked the eastern side of the 18ft. channel between Craney Island light and Lambert's Point light in Elizabeth river. The course of the channel up the river from Craney Island light to black buoy 9 is nearly south; and the channel at buoy 9 turns southeastward towards Norfolk, at an angle of about 65°. But the course coming out from the coal pier at Lambert's Point into the channel, around buy 9, turns an angle of about 45°. According to a chart of this channel (Exhibit X) filed by counsel for the Victory, the distance from Craney Island light to buoy 7 is 1200 yards, or about ⅝ of a mile; and to buoy 9 is 1967 yards, or 1¼ miles; the distance between the two buoys between the two buoys being 735 yards, or ⅜ of a mile. The channel here is easily navigable for ships drawing 25 feet of water. Its breadth, a. Craney Island, 250 yards; and at buoy 9, a mile and an eighth south, is 400 yards, broadening as it extends.

Below Craney Island light, as the river Elizabeth flows, the channel stretches three miles and a half, in a straight course, due north, into Hampton Roads opposite Sewall's Point. There is no obstruction to the view over the entire length of the channel between Sewall's and Lambert's Points, except by such vessels as may happen to be lying near or passing along the channel.

On the western side of the channel, south of Craney Island as far as buoy 9, very spacious waters expand to the shore, which are navigable for a distance of twice the width of the channel for vessels of 8 or 9 feet draft.

East of buoy 9 there is a wide space of water extending

half a mile to land; but it has no navigable depth. It is deceptive, however; and owing to the eastward bend of the (821) channel around buoy 9 to Lambert's pier, navigators coming up from Craney Island are apt to head directly for Lambert's Point light, thinking they are in mid-channel; when, in fact, they are more or less east of mid-channel, are unintentionally violating a cardinal rule of navigation; which enjoins them to keep on the spacious waters west of mid-channel.

It was in the channel and waters thus described, that the collision which has been mentioned occurred. Each ship had on board, as required by law, a licensed pilot, taken up at the Virginia Capes. The Victory was coming into Norfolk in ballast. The Plymothian, having come in for coal, was going out on her voyage to Liverpool.

Just as the Plymothian, having left Lambert's pier, had rounded buoy 9, and had straightened out on her course down the channel; the Victory, in coming up from Hampton Roads, had got just abreast of Craney Island light. It was at about 4 P. M. that the two ships were thus in motion, and began to approach each other at a distance apart at the start of a mile and an eighth.

The Victory had been moving at the rate of ten miles an hour; but at Craney Island she slackened her speed and proceeded up the channel at the rate of six or seven miles an hour, with a two-mile flood tide assisting her.

The Plymothian, on straightening out at buoy 9, had begun to move against the tide at the rate of about four miles an hour. The Plymothian moved on a ported helm and kept well to the eastern side of the channel. The Victory, which, at Craney Island light, was at mid-channel according to most of the evidence, but on the eastern side, according to her own testimony, moved, after or from the time of passing Craney (822) Island light, on or to the eastern side of the channel, under a starboard helm. Each vessel moved so long on these courses under the helms respectively mentioned that, when the collision which was threatened became imminent, and each reversed engines and backed with all speed, they did so ineffectually. The Plymothian's headway was checked, but she had little backward movement, if any, at the time of collision. The Victory's headway was not stayed, and she was still moving forward at the moment of collision. The stem of the Victory, at about 4:14 P. M., came into the port side of the Plymothian at her main bridge, inflicting so deep a wound that she was immediately beached on the bank of the channel east of buoy 7.

Shortly before sounding three whistles and reversing her

engines, the Victory had a schooner close under her starboard side, which prevented her from porting her helm. She had previously met two other schooners on her starboard side. All three of these schooners were on the east of mid-channel bound out to Hampton Roads.

It would seem to be useless to consider how either vessel had moved before the time when, one of them being at Craney Island light and the other off buoy 9, they began at the hour of four P. M. to approach each other in the open channel. But it may as well be premised that the Plymothian had not, before then, in coming out from Lambert's pier, gone over to the west of the channel near to red buoy 22; and had not, after doing so, recrossed the channel to reach its position near buoy 9, as claimed by the Vsctory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect. Nor was the west side of the channel, as seen on that afternoon from Chaney Island light, to red buoy 22, lined with (823) numerous vessels at anchor, to a degree obstructing that side of the channel, as claimed by the same counsel. There were barges and other craft anchored near the red buoy, but not as many as usual. The weight of testimony is, that the western part of the channel, as far at least as abreast of buoy 7, was free from obstruction. The Victory's own witnesses place such schooners as that steamer met after passing Craney Island, east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rule, to take the eastern side. Moreover, the claim of the Victory's crew that each of three steamers which she met in coming from Hampton Roads up Elizabeth river, gave her two whistles and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers, and by all the witnesses in the case, who testified that when she had reached Craney Island she was in mid-channel. The preponderance of testimony in favor of her being in this last named position is so great as to be conclusive of the fact. The only steamer whose crew was not examined on this point was a foreign tramp, and her testimony could not be obtained. But that vessel was met in Hampton Roads three miles from where the next steamer was met, and there was space and time abundant for the Victory to pass to the proper side of the channel after meeting the tramp. Even if the two other steamers had passed on her starboard side, which they deny they did, their distance apart was ample for allowing the Victory to pass between them to the western side of the channel, if she had desired to do so. Nor,

indeed, did the Victory (if in fact she had been pressed by the three steamers to the eastern side of the channel, and was held there when she Craney Island by a sort of marine duress), at any time after sighting the Plymothian, give her alarm signals or any sort of notice that she was on the (824) east side of the channel by a compulsion which she could not throw off.

I consider it proved beyond reasonable doubt that the Victory and Plymothian, at 4 P. M. on the afternoon under consideration, one of them in mid-channel abreast of Craney Island light, and the other in mid-channel abreast of buoy 9, were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction or let or hindrance of any kind.

Much evidence was taken *pro* and *con* on each side, upon the question of the seaworthiness of the whistles of the two steamers. The result of the elaborate testimony taken on this question is to show that the whistles of both steamers were as good as those of English steamers usually are, and were in good working order.

After rounding buoy 9, and straightening out on her course down the channel, the Plymothian gave a long whistle, indicating that she would pass the Victory port to port. It was some time before the Victory answered; which she at length did with a cross signal of two whistles.

Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was half way between Craney Island light and buoy 7. The Plymothian thereupon blew one signal whistle a second time, and was then promptly answered by a cross signal of two whistles by the Victory. The two steamers thereupon, and at the same time, blew alarm signals and at once backed their engines at full speed; and this backing of engines continued until the collision occurred.

The headway of the Plymothian was overcome, and it is possible she attained a slight backward movement. The headway of the Victory was not overcome, and she ran into (825) the Plymothian's broadside with such force as to drive fifteen inches into her side and to render immediate beaching necessary. She penetrated fifteen inches into the Plymothian, notwithstanding the fact that the angle of incidence with that ship was sixty or seventy degrees.

OPINION.

It is obvious, from the foregoing statement, that the question in the case under consideration is, whether or not it is governed by the great rule of the road: "Keep to the right." That rule is embodied, as Article 21, in the Re-

vised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by the Act of Congress of March 3d, 1885, 23 Statutes at Large, 438 *et seq.* The act declares that they shall constitute the rules for the navigation of vessels "upon the high seas and in all coast waters of the United States, except such as are otherwise provided for." The exceptions alluded to are defined by the act itself, in the section declaring that "nothing in these rules shall *interfere with the operation of a special rule*, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation." The *rule* only is excepted, not the coast water itself.

The Act of Congress prescribing these rules is a *law*, of which all the world must take cognizance. Special rules of local ordination are not laws, but rules only; and, in order to be binding, must be brought home to the knowledge of navigators, and proved affirmatively in the courts. I know, however, of no provision of such local rules, so far as they affect our eastern waters navigable from the (826) ocean, which conflicts with the international rules adopted by Congress, and prevailing, by general adoption, the world over.

Those general rules of the world at large, adopted and made laws of the United States by Congress, are in force in the oceans and seas off our coasts, and in all the coast waters of the country, that is to say, in the rivers, bays and roadsteads opening into the ocean, and "allied to ocean navigation, from being used and necessarily used by all ocean bound vessels", and vessels coming in from the outer waters. These rules would be paralyzed if they ceased to operate in favor of ocean ships, as soon as they passed within lines drawn between points of land projecting into the ocean. That they are intended to be in force and operation within such lines is proved by their very terms. Article 21, which has been mentioned would be a meaningless nullity under a contrary contention. Its language is: "In narrow channels every steamer shall, when it is safe and practicable, keep to that side of the fairway, or mid-channel, which lies on the starboard of such ship".

Except in the instances of two or three great straits in different parts of the world, so few in number and each so wide that no rule is necessary in regard to them, no such narrow channels as Article 21 contemplates are to be found beyond lines drawn between the great *fauces terrae* of our seaboard. The contention that this important article applies only to the outer seas would exclude Chesapeake Bay, Hampton Roads and Elizabeth River from the category of

"coast waters". That bay has been called the Mediterranean of America from the vast and varied commerce that floats upon it carried largely in ships of the ocean.

(827) Hampton Roads, from the depth of its waters, its spacious area, and its land-locked conditions of safety, is a favorite resort in storms for all vessels that navigate our Atlantic seaboard. Elizabeth River carries a channel of 25 feet in depth and from 220 to 500 yards in width all the way from Hampton Roads to the National Navy Yard at Gosport. It would be imposing hard lines upon foreign steamers and sailing ships coming up to Norfolk, with and for heavy cargoes, for the courts to repeal Article 21 as to a river traversed so constantly by sea-going ships of the largest size and capacity, as the Elizabeth River is—an Article known to all navigators from every part of the earth—and to dwarf the river into a local harbor, subject to the provincial domination of a town council, and to the crude regulations of ever changing town officials.

It may not be practicable to define with precision the meaning of the phrase "ocean waters". But so far as this court is concerned, I hold, that it embraces all waters opening directly or indirectly into the ocean and navigable by ships, foreign or domestic, coming in from the ocean, of draft as great as is drawn by the larger ships which traverse the open seas. I hold, that all tide-waters, navigable from the ocean, with navigable depth for ocean craft, are coast waters in the meaning of Article 51.

The Elizabeth River between Norfolk and Hampton Roads is one of the ocean waters, and the International Rules of Navigation are therefore in full force and operation in that river.

Elizabeth river is not embraced within the meaning of the clause of the Act of Congress, providing that "a special rule duly made by local authority relative to the navi-
(828) gation of any harbor," shall not be *interfered with* by the International Rules of Navigation. If the river is a harbor at all, it is only as a part of the harbor of Norfolk. But it is not within the territorial limits of Norfolk, and is not subject to any municipal regulation in force within that corporation. It is competent for Norfolk to ordain rules of navigation for her own harbor; but those rules lose their authority when the territorial boundaries of the city, either on land or water, are passed? But even if this were not so, it has not been shown that any rule of navigation ordained by Norfolk for the government of shipping within her own harbor is in conflict with Article 21, or with any other law of navigation embodied in the International Rules. If so, if there be no municipal rule

of navigation in force in Norfolk harbor with which Article 21, or any other International Rule *interferes*, then Norfolk harbor is itself subject to those International Rules, and is in the category of "coast waters" contemplated by the maritime Act of Congress of March 3d, 1885. Those rules are in force in Elizabeth river independently of any rules ordained by Norfolk, and they are in force in Norfolk harbor itself as long as they shall not *interfere* with any rule of navigation which may be enacted by the local municipality. It is fortunate for Norfolk that this is so; it would be a subject of serious public regret if it were not so.

International Article 21 was the law of the road on the occasion when the Plymothian, off buoy 9, and the Victory abreast of Craney Island light, one mile and an eighth a part, began at the same time to approach each other along the narrow channel of Elizabeth river between those two points. The Plymothian obeyed Article 21; the Victory (829) disregarded it. The collision which happened, in direct consequence of the Victory's disloyalty to the rule, was caused by the Victory, and through her fault alone. The fact that she had had a schooner close under her starboard side shortly before the collision did not excuse, but condemned her. The fact that this and two other schooners were moving on her starboard on the eastern side of the channel were three additional reasons why she should have come up on the western side from Craney Island. These three insignificant vessels were teaching her a lesson which she rejected.

International Article 15 did not apply in this case. At a distance of a mile apart, these two steamers, in full sight of the channel between them, by clear daylight, were not approaching each other "in such a manner as to involve risk of collision."

The liability of the Victory for this collision, does not depend upon the question whether the statement of facts drawn up by the court, and prefixed to this opinion, is strictly and in every respect in conformity with the weight of evidence taken in this cause. If there were no other evidence in the record but that given by the master and crew of the Victory, that ship would be shown to be liable. She had no right, seeing the Plymothian coming up the narrow channel, to persist in running on the eastern side of it.

The thoroughly disproved testimony given by her master and the deck witnesses of her crew, intended to show that she was driven to the extreme eastern side of the channel by other steamers and by sailing vessels, has no other value in the case than to show that these witnesses felt the

pinch of Article 21 and made desperate efforts to excuse the obstinate and fatuous perseverance of her navigators (830) in keeping on the eastern, and to them as they well knew, the contraband side of the channel. The Victory is liable for the collision; and I will decree in all respects to that effect.

It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting; and I think both steamers were at fault in not having had each a special lookout on duty. But in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stem. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine room would hardly have differed from those actually given if a lookout had been calling out to them what they both clearly saw and knew.

But it is only with reference to the Plymothian that the question of lookout is of any importance. The contention of counsel for the cargo, that the absence of a lookout on that steamer contributed to the collision, is not supported by the evidence in the case. Inasmuch as this evidence shows that the officers on the bridge did not hear the first cross signals of the Victory, this counsel contends that if there had been a lookout forward, and the pilot Henley, and the master Mardon, had been notified of this cross signal, there would have been time for the Plymothian by hard starboarding, to have passed the Victory on he starboard side. But the proof is, that the Victory blew her first cross signal of two whistles as far off as half way between buoy 7 and Craney Island light, or more than a thousand yards from the Plymothian, before any stress of (831) circumstances arose to require of her a violation of the rule of navigation which she was faithfully adhering to. It was not competent for the Victory, at that distance, to require from the Plymothian a violation of Article 21, unless there was some cause forcing her to do so. That there was no such cause is shown by the evidence, and was virtually confessed by the Victory herself when she failed to follow up her cross signal by additional three sharp alarm whistles giving notice of such a cause. Failing in this, the Plymothian was not, at a distance of a thousand yards and running against a flood tide at the rate of only four miles, either under obligation or at liberty to disregard a cardinal

rule of navigation at the mere cross signal of the Victory. She would not and should not have done so, even if a lookout, properly posted in her bows, had notified her navigators of the cross signal. Her officers on the bridge would and should have pursued precisely the course, if they had known of the first cross signal, which they did pursue on not hearing it; and the absence of a lookout contributed naught towards the collision. I, therefore, consider that the contention of the counsel for the cargo on this point must be overruled.

Although it is wholly unnecessary in this decision to do so, I will notice some references of counsel for the Victory to the decision of this court in the case of the Lawrence ——, New York, rendered in August, 1892, and affirmed on appeal by the U. S. Circuit Court of Appeals for the Fourth Circuit, at its February term, 1893.

Counsel for the Victory contends that in that case this court held that a steamer coming up in the channel of Elizabeth river from Craney Island to Norfolk was at liberty to take either the western or eastern side of the channel at pleasure. The dicision was a very different one, and was (832) rendered in a case having no relation to the question involved in the present litigation. In that case the steamer New York, plying twice a day between Norfolk and Cape Charles City, had, in a foggy morning, while moving at an unlawful speed in a fog, run into the barge Lawrence, which was a very large vessel, loaded with coal, and lying at anchor on the western side of the channel of Elizabeth river, half way between buoy 7 and Craney Island light. It was shown in evidence that the channel where the Lawrence lay was 450 yards wide; that the Lawrence was anchored on its western side as near to the bank as could be to allow of her swinging clear of it, and that at least half of the 225 yards west of mid-channel was clear. The Lawrence was swinging when run into, due north on an ebb tide, and was not only on the western side of mid-channel, but was well off on the western side of that 225 yards of western channel. The steamer New York came down from Craney Island close upon the western side of the channel in a thick fog and struck the Lawrence on her starboard quarter; although there was abundant room between the Lawrence and mid-channel for the New York to pass to the port or east side of her. Nothing is said in the opinion of the court to indicate that the New York, in passing on the port side of the Lawrence, would have passed to the east of mid-channel. Between the Lawrence and mid-channel there was clear space of more than a hundred yards; and the water east of mid-channel was not in the case at all.

The evidence showed that there was not room between the Lawrence and the western bank of the channel for the New York to pass, and the court held that the New York was in fault in not passing on the eastern side of the barge where there was abundant room. The court used the following language in its decision:

(833) "All the testimony shows, and the pleading admit, that they (meaning the Lawrence and a companion barge that was lashed to her port side) were then on the western side of the channel. The evidence shows, moreover, that the New York struck from the west the barge which was the western one of the two. Certainly there was room in a channel, half of it as wide as 225 yards, for a steamer to pass vessels lying in the other half of the channel, which was another 225 yards in width."

That case has, therefore, no analogy with the one at bar. Equally erroneous is the contention of counsel for the Victory that in that same case of the Lawrence–New York this court held that the Elizabeth river north of buoy 9 was a part of the harbor of Norfolk, and subject to her jurisdiction in respect to a harbor master. The facts were, that by a stretch of authority growing out of a public necessity, Norfolk had appointed a nominal harbor master at Lambert's Point, who assumed and exercised the authority of designating places of anchorage for the great number of vessels constantly coming in there for the Pocahontas coal. This harbor master, so called, had for some time been in the habit of anchoring these vessels on the western side of the channel near to red buoy 22, and up and down on that side as far as necessity required. He so acted by general sufferance and from public necessity, and not by conceded authority. This *quasi* official action of his was known to all the masters of steamers which navigated the channel, all of whom acquiesced in and none of whom resisted his authority. Contrary to this self-adopted rule of acquiescence, the master of the New York, in the suit of the Lawrence, among other things contended that the Lawrence, when she was struck by the New York, was unlawfully (834) where she was, and that she had been illegally anchored there by a person who was not a harbor master in the eye of the law.

This court held that she had a right to be where she was when she was struck by the New York. Its language was as follows:

"In a technical point of view, the authority exercised (by the acting harbor master) is probably questionable. But the public interests required that there should be some authority to control and regulate the anchoring of those

loaded vessels, and until the law provides some other means of regulating this important business, custom and general acquiescence must be held competent temporarily to supply the omission of the law. These barges were passive in the matter of being placed in the anchorage in which they lay. They had not gone there of their own volition in a spirit of caprice and indifference to consequences. The presumption is that, objectionable as the practice is of placing vessels along that channel in such numbers as the evidence shows, yet the placing of these particular barges was as judicious as the evil practice admitted of, and I do not feel that it would be competent or just for this court to undertake a reform of this evil by imposing penalties. The reform needed is a subject for municipal legislation, and it is hardly admissible for the court to assume the role of legislation by means of penal decrees and judgments."

There is nothing in this decision that gives countenance to the proposition that the channel of Elizabeth river between Lambert's Point and Craney Island is part of the harbor of Norfolk, subject to her jurisdiction and excepted from the operation of Article 21 of the International Rules of Navigation.

(835) As to the question whether the clause contained in the bills of lading of many British ships and sanctioned by British law, exempting the ship from liability for damages to her cargo, even when occasioned by the negligence, default or error in judgment of the pilot, master mariner or other servants of the ship owner; and some of them containing a clause providing that the contract shall be governed by the laws of the flag of the vessel carrying the goods, it has been settled in this country that such clauses are contrary to public policy and therefore null. I should feel constrained to rule accordingly if the question could rise in the case at bar.

(836) **FINAL DECREE.**

Entered October 30th, 1894.

A collision having occurred between the steamship Victory and the steamship Plymothian in the Elizabeth river on the 12th day of November, 1891, whereby the said steamship Victory and the said steamship Plymothian and the cargo of the Plymothian, respectively, sustained injuries; and the first above entitled action having thereafter been instituted in this court on the 14th day of November, 1891, by S. Elcoate, as master of the steamship Victory, on behalf of the owners of said steamship against the steamship Plymothian to recover the damages sustained by the owners

of said steamship Victory by reason of said collision, and the said steamship Plymothian having been attached under the process issuing in said action; and the second above entitled action having been instituted in this court on the 27th day of November, 1891, by Stephen A. Ralli and others, as owners and underwriters of the cargo of the steamship Plymothian, to recover the damages by them sustained by reason of said collision, and the said steamhip Victory and the said steamship Plymothian having been attached under the process issuing in said action; and the third above entitled action or proceeding having thereafter been instituted in this court on the 3d day of December, 1891, by the petitioners, John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and The British Steamship Investment Trust, Limited, as owners of the said steamship Victory, (837) upon averments that the said collision occurred and the resulting damages, losses, injuries and claims were occasioned and incurred without the privity or knowledge of the petitioners, or of any or either of them, and that the said petitioners were entitled to and desired to contest their liability for all losses, damages, injuries and claims occasioned by or arising out of said collision, and also to have the benefit of the limitation of liability provided by the general maratime law under the provisions of Sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States of America, and the Acts amendatory thereto, and to that end desired that the said steamship Victory be appraised (there being no freight upon the said voyage), and that they be allowed to give a stipulation for the appraised value of the said steamship, and that the said steamship be thereupon released from all liability of arrest, and that all persons having any claims be required to look to said stipulation, and the said steamship Victory having accordingly been appraised, and the value of the interest of her owners therein having been fixed at $67,500, and a stipulation for such value having accordingly been given by the petitioners with sureties, and the prosecution of the second above entitled action having thereupon been restrained and a monition having been issued in said third above entitled proceeding citing all persons claiming damages for loss, destruction, dam- (838) age or injury caused or occasioned by or arising out of said collision to appear before the said court to make due proof of their respective claims and to answer the said

petition, and the Port of Plymouth Steamship Company, limited, having in response to said monition, appeared and proved its claim for loss and damage by reason of the injuries sustained by its said steamship Plymothian in the amount of $41,684.12, with interest thereon from the 1st day of December, 1891, and having filed its answer to the said petition, and the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring and Company, the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America having, in response to said monition, appeared and proved their respective claims as underwriters of the cargo of the steamship Plymothian for injuries sustained by such cargo in the following amounts, to-wit: the Canton Insurance Company, Limited, in the amount of $8,993.29; the Triton Insurance Company, Limited, in the amount of $4,496.64; the Indemnity Mutual Marine Assurance Company, Limited, in the amount of $15,149.41; the Atlantic Mutual Insurance Company in the amount (839) of $3,374.91, the London Assurance Corporation in the amount of $9,387.48, the co-partnership firm of C. T. Bowring & Company in the amount of $1,776.27; the Standard Marine Insurance Company, Limited, in the amount of $8,774.30; the British and Foreign Marine Insurance Company, Limited, in the amount of $2,185.06; and the president and directors of the Insurance Company of North America in the amount of $17,183.61, with interest upon each of said sums from the first day of December, 1891, and having filed their answer to the said petition; and the fourth above entitled action or proceeding having been instituted in this court on the 3rd day of December, 1891, by the petitioner, the Port of Plymouth Steamship Company, Limited, as the owner of the said steamship Plymothian and the freight pending upon her voyage, upon averments that the said collision occurred and the resulting damages, losses, injuries and claims were occasioned and incurred without the privity or knowledge of the petitioners, or of any or of either of them, and that the said petitioners were entitled to and desired to contest their liability for all losses, damages, injuries and claims occasioned by or arising out of said collision, and also to have the benefit of the limitation of liability provided by the general maritime law under the provisions of sections 4,281, 4,282, 4,283, 4,284, and 4,285

of the Revised Statutes of the United States of America, and the Acts amendatory thereto, and to that (840) end desired that the said steamship, and her freight pending upon the voyage, be appraised, and that they be allowed to give a stipulation for the appraised value of the said steamship and freight, and that the said steamship and freight be released from all liability of arrest, and that all persons having any claims be required to look to said stipulation, and the said steamship Plymothian, and freight pending upon the voyage, having accordingly been appraised, and the value of the interest of her owners therein having been fixed at $45,221, and a stipulation for such value having accordingly been given by the petitioners, subject to be diminished however to the extent of certain salvage claims pending against said steamship and her freight, which salvage claims were thereafter duly adjusted at the sum of $5,000; and the prosecution of the first and second above entitled actions having thereupon been restrained, and a monition having been issued in said fourth above-entitled proceeding citing all persons claiming damages for loss, destruction, damage or injury caused or occasioned by or arising out of said collision to appear before the said court to make due proof of their respective claims, and to answer the said petition, and the said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British (841) Steamship Invesment Trust, Limited, having in response to said monition appeared and proved their claims for loss and damage by reason of the injuries sustained by their said steamship Victory in the amount of $14,363,80 with interest thereon from the 1st day of December, 1891, and having filed their answer to the said petition, and the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the copartnership firm of C. T. Bowring and Company, the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the President and Directors of the Insurance Company of North America having, in response to said monition, appeared and proved their claims as owners and underwriters of the cargo of the steamship Plymothian for injuries sustained by such cargo in the following amounts, to-wit: the Canton Insurance Company, Limited, in the amount of $8,993,-

29, the Triton Insurance Company, Limited, in the amount of $4,496,64, the Indemnity Mutual Marine Assurance Company, Limited, in the amount of $15,149.41, the Atlantic Mutual Insurance Company in the amount of $3,374.91, the London Assurance Corporation in the amount of 9,387.48, the copartnership firm of C. T. Bowring and Company in the amount of $1,776.27, the Standa.d Marine Insurance Company, Limited in the
(842) amount of $8,774.30, the British and Foreign Marine Insurance Company, Limited, in the amount of $2,285.06, and the President and Directors of the Insurance Company of North America in the amount of $17,183.61, with interest upon each of said sums from the first day of December, 1891, and having filed their answer to the said petition, and the said actions and proceedings having come on for hearing before this Court, and having been consolidated and heard as one action upon the pleadings, depositions and proofs adduced by the respective parties, and upon the arguments and briefs of their counsel, and due deliberation having been had, it is now ordered, adjudged and decreed by the Court that the said collision, and the loss and disaster arising therefrom, were done and occasioned without the privity or knowledge of the petitioners, John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, The British Steamship Investment Trust, Limited, or any of them, and without the privity or knowledge of the petitioner, the Port of Plymouth Steamship Company, Limited, and that the said petitioners, John MacIntyre, Jr., Thomas C. MacIntyre, James Allen Mac-
(843) Intyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, The British Steamship Investment Trust, Limited, and the said petitioner, The Port of Plymouth Steamship Company, Limited, are entitled to the benefit of the limitation of liability provided for in the Act of Congress of the United States, entitled "An Act to limit the liability of ship-owners and for other purposes, passed March 3d, 1851, and the provisions for limitation of liability as contained in the Revised Statutes of the United States in sections 4281, 4282, 4283, 4284, and 4285, and the several acts and statutes amendatory thereof and supplementary thereto; and that the said collision was due solely to the fault and

negligence of those in charge of and navigating the said steamship Victory, and that the officers and crew and those in charge of and navigating the steamship Plymothian were free from any fault or negligence contributing to the collision; and

That the further prosecution of the said first above entitled action be and it hereby is permanently and forever restrained and enjoined; and

That the further prosecution of the said second above entitled action be and it hereby is permanently and forever restrained and enjoined; and

That the Port of Plymouth Steamship Company, Lim-
(844) ited, and the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring and Company, the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America have and recover their damages as aforesaid against the said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, to the extent of the value of the interest of said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, in the said steamship Victory, to-wit: to the extent of $67,500, less the taxable costs of the petitioners incident to establishing their right to limitation of liability, and that the said parties have judgment therefor, and that the said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen
(845) MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, petitioners, after deducting the amount of their costs incident to establishing their right to limitation of liability, to-wit, $1,138.48, from the appraised value of their said steamship Victory, pay the remaining portion thereof, to-

wit, $66,361.52, as follows, to-wit: to the Port of Plymouth Steamship Company, Limited, the sum of $24,478.78; to the Canton Insurance Company, Limited, the sum of $5,281.23; to the Triton Insurance Company, Limited, the sum of $2,640.61; to the Indemnity Mutual Marine Assurance Company, Limited, the sum of $8,896.43; to the Atlantic Mutual Insurance Company the sum of $1,981.88; to the London Assurance Corporation the sum of $5,512.72; to the co-partnership firm of C. T. Bowring and Company, the sum of $1,043.09; to the Standard Marine Insurance Company, Limited, the sum of $5,152.63; to the British and Foreign Marine Insurance Company, Limited, the sum of $1,283.15; to the president and directers of the Insurance Company of North America, the sum of $10,091.00, with interest on the said several amounts from the date of this decree; and that unless an appeal be taken (846) within the time limited by law and according to the rules and practice of this court, or unless the said sums be paid within thirty (30) days from the date of this decree, then that the said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, as principals, and the co-partnership firm of Baring, Magoun & Company and George C. Magoun as sureties, cause the engagements of their stipulation to be performed and satisfied, and pay into the registry of this court the amount thereof, to-wit, the sum of $67,500, with interest thereon from the date of this decree, to be distributed by the clerk in accordance with the foregoing provisions; and

That the Port of Plymouth Steamship Company, Limited, the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, and all other persons whomsoever claiming, or who may hereafter claim, for any loss, destruction, damage or injury occasioned by said collision, be and the same hereby are perpetually restrained and enjoined from bringing, commencing or instituting, or further prosecuting any suit or suits or proceedings whatever other than this pending proceeding, upon any cause of action whatsoever,

against the said steamship Victory, or against John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, (847) Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Tnomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinsoń, Susan Weekes, Richard Leitch, the British Steamship Investment Trust, limited, her owners, for any loss, damage or injury done, suffered or occasioned by reason of the loss and disaster caused by the collision between said steamships Victory and Plymothian as aforesaid; and

That the said Port of Plymouth Steamship Company, limited, and the said steamship Plymothian be and that they hereby are discharged from this court, and that all claims and proceedings against the said Port of Plymouth Steamship Company, limited, or against the said steamship Plymothian for damages alleged to have been sustained by reason of the collision be dismissed; and

That the said Port of Plymouth Steamship Company, limited, have and recover against the said John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, limited, and against the Canton Insurance Company, limited, the Triton Insurance Company, limited, the Indemnity Mutual Marine Assurance Company, limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the copartnership firm of C. T. (848) Bowring & Company, the Standard Marine Insurance Company, limited, the British & Foreign Marine Insurance Company, limited, and the President and Directors of the Insurance Company of North America, the amount of $945.38, their costs as taxed in the fourth above-entitled proceeding incident to the contest made in respect to the fault and negligence of the said steamship Plymothian, together with the further amount of $736.42, their costs as taxed, incident to establishing their right to limitation of liability, aggregahing $1,681.80, and that they may have judgment therefor, payable as to the Victory's proportion, to-wit: one-half thereof, out of the bond of $67,500, or by her owners as the appellate court may decide, and that unless an appeal be taken within the time limited by law and according to the rules and practice of this court, or unless the said costs be paid within thirty days from the date of this decree, then that execution issue therefor; and

That the said S. Elcoate, master of the steamship Victory, and John MacIntyre, Jr., Thomas C. MacIntyre, James

Allen MacIntyre, Cuthert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, owners of the steamship Victory, and the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Company, the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the President and Directors of the
(849) Insurance Company of North America, and all other persons whomsoever, claiming, or who may hereafter claim, for any loss, destruction, damage or injury occasioned by said collision, be, and the same are hereby, perpetually restrained and enjoined from bringing, commencing or instituting, or further prosecuting any suit or suits, or proceedings whatever, other than this pending proceeding, upon any cause of action whatsoever, against the said steamship Plymothian, or against the Port of Plymouth Steamship Company, Limited, her owner, for any loss, damage, or injury done, suffered or occasioned by reason of the loss and disaster caused by the collision between said steamships Victory and Plymothian.

RO. W. HUGHES,
Judge.

Norfolk, 30th Oct., 1894.

NOTICE OF APPEAL BY CANTON INSURANCE CO., LIMITED, ET AL.

(850) Filed November 12th, 1894.

Sirs:

Please take notice that the Canton Insurance Company, Limited, the Triton Insurance Co., Limited, the Indemnity Mutual Marine Assurance Co., Limited, the Atlantic Mutual Insurance Co., the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Co., Limited, the British & Foreign Marine Insurance Co., Limited, and the president and directors of the Insurance Co. of North America, hereby appeal to the United States Circuit Court of Appeals for the
(851) Fourth Circuit, from the final decree entered in the above entitled consolidated action, on the 30th day of October, 1894, in so far as said decree holds that the officers

and crew and those in charge of and navigating the steamer "Plymothian" were free from any fault or negligence contributing to the collision referred to in said decree, and in so far as said decree holds that the Port of Plymouth Steamship Company, Limited, and the said steamship "Plymothian" be discharged from the court, and that all proceedings against the Port of Plymouth Steamship Co., Limited, or against the "Plymothian" for damages alleged to have been sustained by reason of the said collision, be dismissed, and in so far as said decree holds that the said Port of Plymouth Steamship Co., Limited, should participate in the fund arising from the appraised value of the steamer "Victory" upon equal footing with the appellants instead of subordinating the claim of the Port of Plymouth Steamship Co., Limited, to the claim of the appellants, and in so far as the said decree holds that the said Port of Plymouth Steamship Co., Limited, are entitled to recover costs from the appellants.

NEW YORK, November 10th, 1894.

BUTLER, STILLMAN & HUBBARD,
Proctors for Appellants,
Canton Ins. Co. (Lim.) and others.

To H. S. Ackiss, Clerk.

WHITEHURST & HUGHES,
Proctors for Port of Plymouth S. S. Co. (Lim.)

SHARP & HUGHES,
Proctors for John McIntyre, Jr., et. al.

PETITION FOR APPEAL BY CANTON INSURANCE CO., LIMITED, ET AL.

(852)

Filed November 16th, 1894.

To the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the
(853) Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America respectfully shows to the Court:

On the 12th day of November, 1891, the steamship "Vic-

tory" and the steamship "Plymothian" came into collision in the Elizabeth river near Norfolk, whereby the said steamship "Victory" and the said steamship "Plymothian," and the cargo of the said steamship "Plymothian," respectively sustained injuries.

On the 3d day of December, 1891, the petitioners, John McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, filed their libel and petition in the District Court of the United States for the Eastern District of Virginia, averring that the said collision occurred, and the resulting losses, damages, injuries, and claims were occasioned and incurred, without the privity or knowledge of she said petitioners, or of any or of either of them, and that they were entitled to and desired to contest their liability for all losses, damages, injuries and claims occasioned by or arising out of said collision, and also to have the benefit of the limitation (854) of liability provided by the general maritime law under the provisions of Sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States of America and the Acts amendatory thereto, and to that end desired that the said steamship "Victory" be appraised (there being no freight upon said voyage), and that they be allowed to give a stipulation for the appraised value of the said steamship, and that the said steamship be thereupon released from all liability of arrest, and that all persons having any claims be required to look to said stipulation; that the said steamship "Victory" was accordingly appraised and the value of the interest of her owners therein was fixed at $67,500, and a stipulation for such value was accordingly given by the petitioners, with sureties, and a monition thereupon issued citing all persons claiming damages for loss, destruction, damage or injury, caused or occasioned by or arising out of said collision, to appear before the court to make proof of their respective claims and to answer the said petition; that the Port of Plymouth Steamship Company, Limited, appeared in response to said monition, and proved its claim for loss and damage by reason of the injuries sustained by its said steamship "Plymothian" in the amount of $41,684.12, with interest thereon from the first day of December, 1891, and filed its answer to the said petition; that the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual (855) Marine Assurance Company, Limited, the Atlantic

Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the President and Directors of the Insurance Company of North America, in response to said monition, appeared and proved their respective claims as underwriters of the cargo of the steamship "Plymothian," for injuries sustained by such cargo, in the following amounts, to-wit: The Canton Insurance Company, Limited, in the amount of $8,993.29; The Triton Insurance Company, Limited, in the amount of $4,496.64; the Indemnity Mutual Marine Assurance Company, Limited, in the amount of $15,149.41; the Atlantic Mutual Insurance Company in the amount of $3,374.91; the London Assurance Corporation in the amount of $9,387.48; the co-partnership firm of C. T. Bowring & Co. in the amount of $1,776.27; the Standard Marine Insurance Company, Limited, in the amount of $8,774.30; the British & Foreign Marine Insurance Company, Limited, in the amount of $2,185.06; and the President and Directors of the Insurance Company of North America in the amount of $17,183.61; with interest upon each of said sums from the first day of December, 1891, and filed their answer to the said petition.

On the 3rd day of December, 1891, the petitioner, the Port of Plymouth Steamship Company, Limited, as the (856) owner of the said steamship "Plymothian" and the freight pending upon her voyage, upon averments that the said collision occurred, and the resulting damages, losses, injuries and claims were occasioned and incurred, without the privity or knowledge of the petitioner, and that the said petitioner was entitled to and desired to contest its liability for all loss, damages, injuries and claims occasioned by or arising out of said collision, and also to have the benefit of limitation of liability provided by the general maritime law under the provisions of Sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States of America and the acts amendatory thereto, and to that end desired that the said steamship and her freight pending upon the voyage be appraised, and that it be allowed to give a stipulation for the appraised value of the said steamship and freight, and that the said steamship and freight be released from all liability of arrest, and that all persons having any claims be required to look to said stipulation; that the said steamship "Plymothian" and freight pending upon the voyage were accordingly appraised, and the value of the interest of her owners therein was fixed at $45,221, and a stipulation for such value was accordingly

given by the petitioner, subject to be diminished, however, to the extent of certain salvage claims pending against said steamship and her freight, which salvage claims were thereafter duly adjusted at the sum of $5,000; that a monition has been issued in said proceeding citing all persons (857) claiming damages for loss, destruction, damage or injury, caused or occasioned by or arising out of said collision, to appear before the said court to make due proof of their respective claims and to answer the said petition, and the said John McIntyre, Jr., Thomas G. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, Limited, in response to said monition, appeared and proved their claims for loss and damage by reason of the injuries sustained by their said steamship "Victory" in the amount of $14,363.80, with interest thereon from the first day of December, 1891, and filed their answer to the said petition; and the said Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the President and Directors of the Insurance Company of North America, in response to said monition, appeared and proved their claims as owners and underwriters of the cargo of the steamship "Plymothian" for injuries sustained by such cargo in the following amounts to (858) wit: the Canton Insurance Company, Limited, in the amount of $8,993.29; the Tritton Insurance Company, Limited, in the amount of $4,496.64; the Indemnity Mutual Marine Assurance Company, Limited, in the amount of $15,149.41; the Atlantic Mutual Insurance Company in the amount of $3,374.91; the London Assurance Corporation in the amount of $9,387.48; the co-partnership firm of C. T. Bowring & Co., in the amount of $1,776.27; the Standard Marine Insurance Company, Limited, in the amount of $8,774.30; the British and Foreign Marine Insurance Company, Limited, in the amount of $2,185.06, and the President and Directors of the Insurance Company of North America in the amount of $17,183.61, with interest upon each of said sums from the first day of December, 1891, and filed their answer to the said petition.

Thereafter and on the 20th and 21st days of April, 1894,

the said proceedings came on to be tried, on the issues joined as aforesaid, before the Honorable Robert W. Hughes, District Judge, and were then consolidated and heard as one action upon the pleadings, depositions and proofs adduced by the respective parties, and upon arguments and briefs of their counsel. Thereafter and on the 30th day of October, 1894, a decree was entered, in which it was adjudged, among other things, that the said collision was due solely to the fault and negligence of those (859) in charge of and navigating the said steamship "Victory," and that the officers and crew and those in charge of and navigating the said steamship "Plymothian" were free from any fault or negligence contributing to the collision, and that the said Port of Plymouth Steamship Company, Limited, and the said steamship "Plymothian" be discharged from the court, and that all claims and proceedings against the said Port of Plymouth Steamship Company, Limited, or against the said steamship "Plymothian," for damages alleged to have been sustained by reason of the said collision be dismissed, and that the said John McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, Limited, after deducting the amount of their costs incident to establishing their right to limitation of liability, to wit: $1,138.48, from the appraised value of their said steamship "Victory," pay the remaining portion thereof, to-wit: $66,361.52 pro rata, to the Port of Plymouth Steamship Company, Limited, to the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, (860) and the President and Directors of the Insurance Company of North America, according to the amount of the claims established by said parties, respectively, and that the said Port of Plymouth Steamship Company, Limited, recover costs in the amount of $1,681.80, payable one-half thereof by the owners of the "Victory," and one-half by the said Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insur-

rance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co,, the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the President and Directors of the Insurance Company of North America.

Your petitioners are advised and insist that said final decree is erroneous, in that it adjudges that the officers and crew and those in charge of and navigating the said steamship "Plymothian" were free from any fault or negligence contributing to the said collision, and in that the said decree adjudges that the Port Plymouth Steamship Company, Limited, and the said steamship "Plymothian" be discharged from the court, and that all proceedings against the Port of Plymouth Steamship Company, Limited, or against the "Plymothian" for damages alleged to have been sustained by reason of the said collision be dismissed, and in that the said decree adjudges that the said Port of
(861) Plymouth Steamship Company, Limited, should participate in the fund arising from the appraised value of the steamship "Victory" upon equal footing with the petitioners, instead of subordinating the claim of the Port of Plymouth Steamship Company, Limited, to the claim of your appealing petitioners, and in that the said decree adjudges that the said Port of Plymouth Steamship Company, Limited, is entitled to recover costs from your appealing petitioners, and in that the said decree does not adjudge that the officers and crew and those in charge of and navigating the said steamship "Plymethian" were guilty of fault or negligence contributing to the said collision, and in that the said decree does not adjudge that the said Port of Plymouth Steamship Company pay its due proportion of the damages sustained by the appealing petitioners.

For these and other reasons your petitioners appeal from the said final decree to the United States Circuit Court of Appeals for the Fourth Circuit, and on said appeal they intend to seek a new decision on the law and on the facts, upon the pleadings and proofs in said District Court and upon new pleadings and proofs to be introduced in said United States Circuit Court of Appeals, and to that end pray that the records and proceedings of said District Court may be returned to the said United States Circuit Court of Appeals for the Fourth Circuit, and that the said decree may be reversed to such extent as to grant to your peti-
(862) tioners relief in respect to the errors hereinbefore referred to, and more particularly set forth in the Assignment of Errors filed herewith, and to give to the appellants

their costs upon the appeal, and such other, further and different relief as in law and justice they may be entitled to receive.

Dated New York, November 15th, 1894.

BUTLER, STILLMAN & HUBBARD,
Proctors for Canton Insurance Co. (Lim.), et al.,
Appealing Petitioners.

ALLOWANCE OF APPEAL.

The foregoing appeal is hereby allowed.

Dated, Norfolk, November 16th, 1894.

RO. W. HUGHES,
Judge.

ASSIGNMENT OF ERRORS BY CANTON INSURANCE CO., LIMITED, ET AL.

(863)

Filed November 16th, 1894.

The Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, appellants herein, hereby assign error to the decree of the District Court of the United States for the
(864) Eastern District of Virginia in the above-entitled causes in the following particulars:

First. In that the said decree adjudged that the collision referred to in the proceedings was due solely to the fault and negligence of those in charge of and navigating the said steamship "Victory," and that the officers and crew and those in charge of and navigating the said steamship "Plymothian" were free from any fault or negligence contributing to the collision.

Second. In that the said decree adjudged that the said John McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, after deducting the amount of their costs incident to establishing their right to limitation of liability, to-wit, $1,138.48, from

the appraised value of their said steamship "Victory," pay the remaining portion thereof, to-wit, $66,361.52, pro rata to the Port of Plymouth Steamship Company, Limited, the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Insurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co part-
(865) nership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, according to the amounts of the claims established by the respective parties.

Third. In that the said decree adjudged that the said Port of Plymouth Steamship Company, Limited, and the said steamship "Plymothian" be discharged from the District Court, and that all claims and proceedings against the said Port of Plymouth Steamship Company, Limited, or against the said steamship "Plymothian," for damages alleged to have been sustained by reason of the collision be dismissed.

Fourth. In that the said decree adjudged that the said Port of Plymouth Steamship Company, Limited, have and recover one-half of its taxed costs aggregating $1,681.80 from the said Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the
(866) president and directors of the Insurance Company of North America.

Fifth. In that the said decree did not adjudge that the officers and crew and those in charge of and navigating the said steamship "Plymothian" were guilty of fault or negligence contributing to the collision.

Sixth. In that the said decree did not adjudge that the claim of the Port of Plymouth Steamship Company, Limited, against the fund arising from the appraised value of the said steamship "Victory" should be subordinated to the claims of the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited,

and the president and directors of the Insurance Company of North America.

Seventh, In that the said decree did not adjudge that the said Port of Plymouth Steamship Company, Limited, should pay to the said Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bow-
(867) ring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, its due proportion of their respective claims, to the extent of the appraised value of the said steamship "Plymothian" and her freight.

Eighth. In that the said decree did not adjudge that any portion of the respective claims of the Canton Insurance Company, limited, the Triton Insurance Company, limited, the Indemnity Mutual Marine Assurance Company, limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the copartnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, the British & Foreign Marine Insurance Company, and the President and Directors of the Insurance Company of North America, which the said appraised value of the "Plymothian" and her freight should be insufficient to pay, should be paid by the said John McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, limited, from the fund arising from the appraised value of the said steamship "Victory" before making any payment or allowance in respect to the claim of the said Port of Plymouth
(868) Steamship Company, limited.

Ninth. In that the said decree did not adjudge that the said Canton Insurance Company, limited, the Triton Insurance Company, limited, the Indemnity Mutual Marine Assurance Company, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the copartnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, limited, the British & Foreign Marine Insurance Company, limited, and the President and Directors of the Insurance Company of North America, should recover their costs.

Dated New York, November 15th, 1894.

BUTLER, STILLMAN & HUBBARD,
Proctors for Canton Ins. Co. (Lim.) et als.

(869) **CITATION.**

To John McIntyre, Jr., Thomas C. McIntyre, James Allen McIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weeke, Richard Leitch and the British Steamship Investment Trust, Limited, owners of the steamship "Victory," and to the Port of Plymouth Steamship Company, Limited, owner of the steamship "Plymotian":

Whereas, the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Company, Limited, the British & Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, have lately appealed to the United States Circuit Court of Appeals for the Fourth Circuit from the final decree entered in the District Court of the United States for the Eastern District of Virginia, made and dated the 30th day of October, 1894, and entered on that day in the clerk's office of the said District Court of the United States for the Eastern District of Virginia, and have paid the costs adjudged against them, and have given the security required by law.

You are hereby cited to appear before the said United
(870) States Circuit Court of Appeals for the Fourth Circuit, at the city of Richmond, on the 10th day of January, 1895, to do and receive what may pertain to justice in the premises.

Given under my hand, in the State of Virginia, in the Eastern District of Virgnia, in said Circuit on the 11th day of December, 1894.

RO. W. HUGHES,
Judge.

NOTICE OF APPEAL BY JOHN MACINTYRE, JR., ET AL.

(871) Filed November 28th, 1894.

Sirs:

Please take notice that John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan

Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, as owners of the steamship Victory, hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit, from the final decree entered in the above entitled consolidated action, on the 30th day of October, 1894, in so far as said decree holds that the officers, and (872) crew and those in charge of and navigating the steamer "Plymothian" were free from any fault or negligence contributing to the collision referred to in said decree, and in so far as said decree holds that the Port of Plymouth Steamship Company, Limited, and the said steamship "Plymothian" be discharged from the court, and that all proceedings against the Port of Plymouth Steamship Co., Limited, or against the "Plymothian" for damages alleged to have been sustained by reason of the said collision, be dismissed, and in so far as the said decree holds that the said steamship "Victory," her master or crew, were in fault in any respect, and in so far as the said decree fails to adjudge that all of the costs of contesting the question of liability in the limited liability proceedings should be charged as a credit on the bond given for the appraised value of the steamship "Victory" in said proceedings, and for other errors apparent on the face of said decree.

NORFOLK, November 27th, 1894.

SHARP & HUGHES,
Proctors for the Appellants,
John MacIntyre, Jr., and others.

To H. S. Ackiss, Clerk.

Mess. WHITEHURST & HUGHES,
Proctors for Port of Plymouth S. S. Co. (Lim.)

Mess. BUTLER, STILLMAN & HUBBARD,
Proctors for Canton Insurance Co. (Lim.) and others.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS OF (873) JOHN MACINTYRE, Jr., ET AL.

Filed November 28th, 1894.

To the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brother-

ton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, limited, respectfully represents that they are aggrieved by the final decree of the District Court of the United States in this cause entered at Norfolk on October 30th, 1894, holding the Victory solely in fault for the collision in the proceedings mentioned and awarding damages against her.

For a history of this litigation the petitioners refer to the petition of the Canton Insurance Company, limited, and others, owners of the cargo of the steamship Plymothian, heretofore filed in this cause.

The petitioners assign the following errors in the said decree:

1. The court erred in holding that the collision in the pleadings mentioned was due solely or partly to the fault and negligence of those in charge of and navigating the steamship Victory.

2. The court erred in holding that those in charge of and navigating the steamship Plymothian were free from any fault or negligence contributing to the collision.

3. The court erred in awarding to the Port of Plymouth (874) Steamship Company, limited, owner of the Plymothian, and to the Canton Insurance Company, limited, and others, owners of the cargo of the Plymothian, damages against the steamship Victory or her owners by reason of said collision.

4. The court erred in discharging from the court the said Port of Plymouth Steamship Company, limited, and dismissing the proceedings against it, or against the said steamship Plymothian.

5. The court erred in adjudging costs to the Port of Plymouth Steamship Company, limited, against the Victory, incident to the contest made in respect to fault and negligence of the Steamship Plymothian, and also in awarding them costs incident to their proceeding to establish their right to limitation of liability.

6. The court erred in not allowing the petitioners to credit against the bond given by them all the costs in the case, whether incident to the proceeding for limitation of liability, or to contesting the question of fault.

7. The court erred in enjoining the petitioners from proceeding against the steamship Plymothian or the Port of Plymouth Steamship Company, limited, for damages by reason of said collision.

The petitioners feeling aggrieved by said decree, hereby appeal from the whole of said decree to the Circuit Court of Appeals for the Fourth Judicial Circuit, and pray that

the same, with a full transcript of the record, may be sent to the said court without delay, and that said court will proceed to hear said cause upon said record, or upon any additional evidence that may be adduced, and that said decree be reversed, and that a decree be entered in favor of said petitioners and against the Port of Plymouth Steamship Company, limited, or the steamship Plymothian awarding to the petitioners their damages and costs, and that (875) the petitioners may have such other and further relief as in law and justice they may be entitled to receive.

JOHN McINTYRE, JR., ET AL.
By SHARP & HUGHES,
Proctors.

ALLOWANCE OF APPEAL.

Appeal allowed as prayed for. It appearing that the stipulation in the District Court of conditioned for the Appellate Court, no further bond is required.

RO. W. HUGHES,
Judge.

28th Nov., 1894.

(876) **CITATION.**

UNITED STATES OF AMERICA—*ss:*

The President of the United States, to the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Insurance Company, Limited, the Atlantic Mutual Insurance Company, the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Company, the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, the president and directors of the Insurance Company of North America, and the Port of Plymouth Steamship Company, Limited—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 10th day of January next, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia, in your favor passed in a cause in said court wherein John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline

Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert W. Hughes, judge of the District Court of the United States for the Eastern District of Virginia, this 11th day of December, in the year of our Lord one thousand eight hundred and ninety-four.

RO. W. HUGHES,
Judge.

Service accepted.

BUTLER, STILLMAN & HUBBARD,
Proctors for cargo owners.

WHITEHURST & HUGHES,
Proctors for owners of SS. Plymothian.

STIPULATION.

(877) It is agreed by the counsel in these causes that the record in these cases on appeal shall consist of the following papers:

1. The petition of the owners of the steamship Victory for limitation of liability and the answer of the underwriters on the cargo of the steamship Plymothian thereto, and the answer of the Port of Plymouth Steamship Company in said proceedings.

2. The petition of the Port of Plymouth Steamship Company, Limited, for limitation of liability and the answers of the Underwriters on her cargo and of the owners of the steamship Victory thereto.

3. The evidence taken in the case.

4. Extracts from the answer of S. Elcoate, Master of the steamship Victory, to the libel of the Underwriters on the cargo of the steamship Plymothian.

5. Extracts from the answer of Allen Mardon, Master of the steamship Plymothian to the libel of the Underwriters on the cargo of the Plymothian, and to the libel of S. Elcoate, Master,

6. Piece of harbor chart No. 403; chart No. 400, of Hampton Roads; Exhibit "X" (enlarged chart); Exhibits "Photo. 1, 2, 3, 4," showing injuries to vessels, all of which are to be certified to the Appellate Court as originals.

7. Opinion and final decree and petitions for appeal and assignment of errors, it being agreed that the cause shall be heard as one case on one record.

It is stipulated that under the foregoing petitions for limitation of liability, appraisals were duly had, bonds were (878) given, monitions were issued and claims were proved and filed as recited in said decree. Such proceedings, however, are omitted from the record as uncecessary for the consideration of the questions involved upon this appeal.

It is lurther agreed that the costs of the District Court are as follows:

Costs incident to Victory's petition for limitation of liability proper.	$1,138 48
Costs incident to Plymothioan's petition for limitation of liability proper.	736 42
Costs incidents to trying the question of fault.	945 38

SHARP & HUGHES,
For the Victory & owners.
BUTLER, STILLMAN & HUBBARD,
Proctors for Canton Ins. Co., et al.
WHITEHURST & HUGHES,
For Plymothian & owners.

(879) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA,
Eastern District of Virginia, } *ss.*

I, H. S. Ackiss, clerk of the District Court of the United States for the Eastern District of Virginia, in the Fourth Circuit, at Norfolk, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings (according to an agreement of counsel) had in said court under the title of cause set out in the beginning, as the same remain of record and on file in said office.

{ Seal of the Court. } In testimony whereof I have caused the seal of the said court to be hereto affixed, at the city of Norfolk, in the Eastern District of Virginia, in the Fourth Circuit, this 11th day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and nineteenth.

H. S. ACKISS,
Clerk.

District Court costs (see stipulation, page 877).
Cost of this record, $125. (Paid by Appellants).

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, FEBRUARY TERM, 1895.

February 11, 1895, cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel and submitted.

On the same day the following stipulation and three bills of lading were produced and filed:

STIPULATION.

It is agreed between counsel for the cargo owners and their underwriters and counsel for the steamship Plymothian that of the cargo of 3,682 bales of cotton shipped on said steamship at Galveston, Texas, bound for Liverpool, and afterwards damaged by the collision between the Victory and Plymothian, 1,671 bales thereof were shipped thereon under bills of lading of the Texas-European Steamship Line, all of which contained, among other provisions, the following:

"It is mutually agreed that the vessel shall not be liable for loss or damage occasioned * * * by collisions, stranding or other accidents of navigation of whatsoever kind (even when occassioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the ship owners, not resulting, however, in any case, from want of due diligence by the owners of the vessel, or by any of them, or by the ship's husband or manager)."

* * * * * * *

"This contract shall be governed by the law of the flag of the vessel carrying the goods, except that general average shall be adjusted according to York-Antwerp rules. In accepting this bill of lading, the shipper, owner and consignee of the goods and the holders of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding."

That the other 2,011 bales of cotton were shipped from interior points on through bills of lading given by the inland carrier to the shipper covering transportation *via* Galveston to European destination. The cotton upon reach-

ing Galveston was delivered by the inland carrier to the steamship Plymothian, which issued, upon receiving the said cotton on board, other bills of lading or receipts therefor to the inland carriers, all of which contained both the negligence and flag clauses in substantially the language hereinbefore set forth. The through bills of lading given by the inland carriers contained the negligence clause as above set forth, but did not contain the flag clause.

That originals or copies of the three forms of bills of lading or receipts will be produced at the hearing and used by consent as fully and effectually as if the same had been certified up as originals by the District Court Judge.

That the steamship Plymothian is, and was at the time of the shipment of said cargo and subsequently of the collision, a British vessel, and sailing under the British flag.

That the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the briefs and upon the arguments of counsel to such printed reports as proofs in this case of the law of Great Britain in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the record.

BUTLER, STILLMAN & HUBBARD,
Proctors for Plymothian Cargo.

WHITEHURST & HUGHES,
Counsel for SS. Plymothian.

It is agreed that the clerk shall file the foregoing stipulation, together with the three bills of lading used as originals under said stipulation, in open court, as of the day of argument before the Circuit Court of Appeals, to-wit; the 11th day of February, 1895.

BUTLER, STILLMAN & HUBBARD,
for Plymothian Cargo.

WHITEHURST & HUGHES,
Counsel for SS. Plymothian.

BILLS OF LADING.

Received, in apparent good order and condition, from Hayden & Clarkson by J. Moller & Co., agents or charterers of the steamer Plymothian, (100) one hundred bales cotton weighing 54724 pounds (being marked and numbered as in the margin, weight, quality, value and contents unknown), to be transported by said steamer or any other steamers of the "Texas-European Steamship Line," from the port of Galveston, and to be delivered in the like order and condition, from the vessel's tackle, at the port of Liverpool (or so near thereunto as she may safely get, and always lie afloat), subject to the under-mentioned stipulations when the vessel's responsibility shall cease, unto order , he or they paying freight for the said goods, without allowance of credit or discount, in cash if in the U. K., or at current rate of Sterling Exchange for Bankers' bills on London, @ 8 d/s if at a port outside of the U. K., at the rate of (68c.) sixty-eight cents per (100 lbs.) hundred pounds (Exchange @ $4.80 per £ Sterling) gross invoice or discharged weight at vessel's option, with charges as per margin, and average accustomed. Consignee shall exhibit the true invoice to the vessel's agents whenever called upon to do so.

(2) It is mutually agreed that the vessel has liberty, in the event of her being full of cargo or putting back to any port, or otherwise being prevented from any cause from proceeding on the ordinary course of her voyage, to tranship the goods by any other steamer or steamers; to call at any port or ports, in any order, to land and receive goods, coal, passengers, or for any other purpose; to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; to convey goods in lighters to and from the ship at the risk of the owners of the goods. (3) Also, that the vessel shall be entitled to commence discharging twenty-four hours after arrival at port of discharge; and if there be not sufficient water for the steamer to enter such port the first tide after arrival, and to lie always afloat, lay days are to count, and | or demurrage to accrue (in the case of Rouen, arrival at Havre Roads to be considered as off the port of Rouen), and any lighterage incurred to reach the port of discharge is to be at the

Form No. 2*

TEXAS-EUROPEAN STEAMSHIP LINE.

Consisting of 25 Strictly First-Class Steamers.

Galveston to Liverpool.—Havre and Bremen.

Agents.

CULLIFORD, CLARK & CO., Liverpool,
ED. LARUE & CO., Havre,
HERM DAUELSBERG, Bremen,
J. MOLLER & CO., Galveston.

MARKS.	WEIGHTS.
[D. D. D.] 100 B & C. E.	54,724.
Notify Swanson, Cairns & Co., Liverpool.	
£	s. d.
FREIGHT, Charges Advanced,	
Total £	

For which Vessel has a lien on the goods.

expense and risk of the receivers of the cargo pro rata, any custom of the port to the contrary notwithstanding. The goods shall be taken from the vessel's tackle directly on their being landed, otherwise she shall be at liberty to put them into store, warehouse or craft, or on the quay, at the receiver's risk and expense, and shall have a lien on such goods until the payment of all costs and charges so incurred. The vessel's responsibility shall cease immediately on the goods being discharged from the ship's tackle, any custom of the port to the contrary notwithstanding. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the vessel. The master porterage of the delivery of the cargo to be done by the agent of the vessel, at the expense and risk of the receivers of the cargo. Tonnage and shed dues payable by receivers of the cargo. (4) Also, that shipper of any inflammable, explosive or dangerous goods, shipped without full description of their nature, whether such shipper be principal or agent, shall be liable for any loss or damage to vessel or cargo, caused by such goods, and such goods may be thrown overboard or destroyed at any time without compensation. (5) Also, that all fines, expenses or losses by detention of, or damage to vessel or cargo, caused by incorrect or insufficient marking of the packages, or description of their contents, shall be paid by the consignee of the goods, and the vessel has a lien upon the same until the payment of all such costs, charges or damages is made. (6.) Also, that in case the vessel be prevented from reaching her destination by quarantine, she may discharge the goods into any depot or lazaretto at the port of destination, and such discharge shall be deemed a final delivery under this contract, and all extra expenses thereby incurred on the goods shall be a lien thereon. (7.) Also, that full freight is payable on damaged goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage; freight on all liquids to be paid on intake quantity. (8.) Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the vessel shall be entitled to recover the difference from the shipper. (9.) Also, that in the event of short delivery, for which the vessel may be held responsible

at her destination, the price shall be the market-price at that port on the last day of landing of the cargo, less all charges saved. (10.) Also, that should the vessel be ordered to a port of discharge inaccessible by reason of ice on her arrival, she shall proceed to the nearest safe open port and telegraph arrival there to consignees of cargo, and shall there discharge her cargo and receive the same freight as if she had discharged at the port to which she was originally ordered. (11.) Also, that goods, which by special agreement herein are to be forwarded from port of destination of the vessel to any port or place, shall be so forwarded at her expense, but at the risk of the owners of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit. (12.) Also, that the vessel shall not be liable for loss or damage occasioned by causes beyond her control, by the perils of the sea, rivers, canals and navigation, by fire from any cause or wheresoever occurring, by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in the hull, machinery or appurtenances, by collisions, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the ship-owner, not resulting, however, in any case from want of due diligence by the owners of the vessel, or by any of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the weakness or insufficiency of packages or bagging, nor for land damage, nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description, nor for risk of craft, bulk or transhipment, nor for any loss or damage caused by the prolongation of the voyage from any of the aforesaid perils, matters or things, nor shall the vessel be required to use more dunnage for the protection of the cargo than is customary and required at the port of Liverpool. (13.) Also, that this bill of lading, duly endorsed by consignee, shall be given up on demand to vessel's

agents, in exchange for captain's copy and order for delivery.

This contract shall be govered by the law of the flag of the vessel carrying the goods, except that general average shall be adjusted according to York-Antwerp rules. In accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding.

In witness whereof, the master of said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

Dated at Galveston, this the 10th day of October, 1891.

J. MOLLER & CO.

(Endorsed)

SLAYDEN CLARKSON,
SWANSON, GHERSON & CO.,
JOHN REW & CO.

GULF, COLORADO & SANTA FE RY.

OCEAN BILL OF LADING—TO BE USED ONLY IN CONNECTION WITH THROUGH BILLS OF LADING.

1. Shipped, in apparent good order and condition, by N. P. Anderson & Co. from Galveston, in and upon the Steamship Plymothian, now lying in the port of Galveston, to say (50) fifty bales cotton, weighing 25,226 pounds, being marked as per margin (weight, quality, contents and value unknown), and to be delivered in like good order and condition from the steamer's tackle (where the carrier's responsibility ceases), at the port of Liverpool (or so near thereunto as she may safely get and always lie afloat), unto order or to his or their assigns, he or they paying freight in cash, without discount in the United Kingdom; or at current rate of sterling exchange for bankers' bills on Lon-

lon at eight days' sight, if at a foreign port, in exchange for delivery order on the said goods at the ate of 1.41 cents per hundred pounds (Exchange @ $4.80 per £ Sterling) on the actual gross weight hipped with charges as per margin.

2. It is mutually agreed, that in the absence f fraud, clerical, or obvious error, this bill of laing signed by the master shall be conclusive evience against the shipowner that the above-menioned number of bales have been received, but his bill of lading shall not be signed except for argo already on board, in single compressed bales. Cotton on through bill of lading shall not be signed or until actually on board the steamer. In case ny portion of the cargo shall be shut out of the essel, the master shall have liberty to forward ame by another steamer or steamers on conference erms (at the risk of the owners of said cargo). otice of such forwarding shall be sent to the hipper when practicable, and any difference in eight resulting therefrom shall be paid or reived by the charterer and | or shipowner.

3. Also that the ship shall have liberty to sail ithout pilots; to tow and assist vessels in distress; deviate for the purpose of saving life or property; at the carrier shall have liberty to convey goods lighters to and from the ship at the risk of the ners of the goods; and, in case the ship shall t into a port of refuge, or be prevented from any use from proceeding in the ordinary course of r voyage, to tranship the goods to their destinaon by any other steamship; if there be not sufficnt water for the steamer to enter the port of scharge on the Continent the first tide after arri, and to lie always afloat, lay days are to count, d | or demurrage to accrue from twenty-four urs after arrival off the port (in the case of Rouen ival at Havre Roads to be considered as off the t of Rouen), and any lighterage incurred to ch the port of discharge is to be at the expense l risk of the receivers of the cargo *pro rata*, any tom of the port to the contrary notwithstanding.

4 Also, that the carrier shall not be liable for s or damage occasioned by causes beyond his trol; by the perils of the sea, rivers, canals and igation; by fire from any cause or wheresoever urring; by barratry of the master or crew; by mies, pirates or robbers; by arrest and restraint

TEXAS-EUROPEAN STEAMSHIP LINE.

Consisting of 25 Strictly First-Class Steamers.

Galveston to Liverpool.—Havre and Bremen.

Agents.

J. MOLLER & Co., Galveston, Texas.
CULLIFORD, CLARK & Co., Liverpool,
ED. LARUE & Co., Havre,
HERM DAUELSBERG, Bremen,

T. F. H., 50 B. & C.

Total Freight due Vessel.

25,226 lbs.
@ $1.41 ℔ 100 lbs.
= $355.63 @ $4.86.
℔ £, = £74.2.0. Stg.

Not Negotiab e.

Notify
Frederic Zerega & Co.,
Liverpool, England.

of princes, rulers or people; riots, strikes or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by collisions, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of th em, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for errors, insufficiency, or absence of marks, numbers, address or description; nor for accidental obliteration thereof; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage from any of the aforesaid perils, matters or things.

5. Also, that the steamer shall be entitled to commence discharging twenty-four hours after arrival. The goods shall be taken from the ship's tackle directly on their coming to hand in discharging the ship, otherwise the master or ship's agents shall be at liberty to enter and land the goods, or put them into store, warehouse or craft, or on quay, at the receiver's risk and expense; and shall have a lien on such goods until the payment of all costs and charges so incurred. The ship's responsibility shall cease immediately on the goods being discharged from the ship's tackle, any custom of the port to the contrary notwithstanding. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship. The master porterage of the delivery of the cargo in the United Kingdom to be done by the consignees of the steamer, and the expense thereof to be paid by the receivers of cargo. Tonnage and shed dues payable by receivers of cargo.

6. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

7. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

8. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazeretto at the port of destination, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

9. Also, should the steamer be ordered to a port of discharge inaccessible by reason of ice or blockade on the steamer's arrival, the master shall have the option of waiting until the port is again open, or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to freighter), where he shall receive fresh orders for an open and accessible port of discharge, in the United Kingdom or Continent as above, within twenty-four hours of arrival or lay days to count. If so ordered, the steamer shall receive the same freight as if she had discharged at the port to which she was originally ordered; but if ordered to a port more than 100 nautical miles distant from such open port or roadstead, the freight shall be increased by one shilling per ton on the steamer's net register tonnage. In no case shall the steamer be ordered from port of call to an ice-bound port.

10. Also, that the steamer has liberty to call at any port or ports for coals, and | or necessary supplies, on the western side of the Atlantic, not north of Newport News, or Norfolk, Va. This clause not to apply to vessels sailing from ports north of Norfolk, Va.

11. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

12. Also, that all cargo on board unclaimed by bill of lading shall be deposited with some proper public authority to be held until claimed by its owner, and freight and charges thereon paid, and if not claimed within ninety days, to be sold on behalf of whom it may concern.

13. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to

cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

14. Also, that in the event of short delivery when the ship reaches her destination, the price shall be the market price at that port on the last day of landing of the cargo, less all charges saved.

15. Also, that all disputes under this bill of lading arising at United Kingdom ports, where the sum in dispute or damage claimed is not more than £50, shall be settled by arbitration at port of delivery, in the manner customary there.

16. In case of any disaster involving the discharge of damaged cargo at any port short of Europe, immediate notice shall be given by the master or his agents, to the owners of the said cargo (or their agents), and | or to the National Board of Marine Underwriters in New York, who are hereby authorized to, and shall at once, one or other, demand a surrender on conference terms of all such damaged cargo as shall be declared by two duly constituted surveyors to be unfit for shipment under deck to port of discharge, or declared by them to be damaged to such an extent as to make its retention for reshipment in the same vessel prejudicial; one of the said surveyors to be appointed by the master and the other by the National Board of Marine Underwriters, and in case of difference, an umpire to be mutually agreed upon by the aforesaid surveyors, and failing agreement in such appointment of umpire, then an umpire to be appointed by the president of the New York Produce Exchange, and the master shall, on such damaged cargo being demanded, at once make such surrender; and if any portion of such cargo be not demanded within ten days of the completion of such survey, it may be sold at auction for account of whom it may concern.

17. This contract shall be governed by the law of the flag of the vessel carrying the goods, except that general average shall be adjusted according to York | Antwerp Rules, 1890. In accepting this bill of lading the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder.

18. No alteration of any printed clause, in

writing or by stamping, shall be binding on either party, unless initialed by the person signing bill of lading and the shipper.

In witness whereof, the master hath affirmed to two bills of lading, all of this tenor and date, one of which being accomplished, must be given up to the carrier, and the others to stand void.

Dated in Galveston, this 29 day of October, 1891.

A. MARDON,
Master.

The goods referred to in this bill of lading, are such portion of those mentioned in the through bill of lading, No. 48, Con. 287, dated Oct. 7, '91, and shipped at Ardmore by N. P. Anderson & Co. (for SS. Sandfield), as have been actually put on board the steamer; but the said goods are only carried on the terms and conditions of this present ocean bill of lading, and are to be delivered upon presentation of the said through bill of lading, and this ocean bill of lading together; or upon the through bill of lading alone, provided that the master is satisfied by comparing the same with his copy of ocean bill of lading, of the identity of the goods called for; and provided that the consignee gives a guarantee satisfactory to the shipowner against all claims by holders of the ocean bill of lading, and to produce the latter in due course; and indemnifies the owners and master against all claims by holders thereof, in consequence of delivery without production thereof.

A. MARDON,
Master.

Bill Lading No. 48. Contract No. 287.

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY.

From Ardmore, Ind. Ter., to Liverpool, England.

Shipped, in apparent good order by Neil P. Anderson & Co., the packages, property or articles, marked, numbered and specified as below. Contents, guage, value and condition of contents unknown. Weights subject to correction.

MARKS AND NUMBERS.	ARTICLES.
T. F. H.	Fifty Bales Cotton. Notify Frederic Zerega & Co., Liverpool, Eng.

Gross weight, 25226 lbs.
Rate of freight, 141 cents per 100 lbs., $
Total freight, $ at $4.80 £

☞ The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment.

To be delivered in like good order and condition unto order C. L. Anderson, cashier, or to his assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred forty-one cents per hundred pounds, gross invoice weight, with average accustomed (at $4.80 to the pound sterling), under the following terms and conditions, viz:

(1.) All goods or property under this bill of lading will be subject, at its owner's cost, to all necessary cooperage or baling.

(2.) That the said Gulf, Colorado & Santa Fe Railway Company and its connections which receives said property, shall not be liable for rust of iron and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind, occasioned by delays from any cause, or by changes of weather; nor for loss or dam-

age on any article or property whatever, by fire or other casualty while in transit, or while in deposit of places of transhipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes or canals. All goods or property under this bill of lading is to be transported to the depots of the companies, or landings of the steamboats or forwarding lines at the points receipted to for delivery.

(3.) It is further agreed, that said Gulf, Colorado & Santa Fe Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots, or parts of lots, as they may be delivered to them.

(4.) It is further stipulated and agreed, that in case of any loss, detriment or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage.

(5.) And it is further agreed, that the amount of loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6.) The Gulf, Colorado & Santa Fe Railway Company and its connections will not be held accountable for gold, silver, bullion, specie, jewelry, precious stones or metals, unless so specified in the bills of lading, and the value declared therein.

(7.) It is further agreed, that the said Gulf, Colorado & Santa Fe Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished, and the liability of the Gulf, Colorado & Santa Fe Railway Company, as common carriers thereunder, terminates on the delivery of the goods or property to the steamship or steamship company, or their agents, at Galveston, Tex., when the responsibility of the steamship or steamship company commences, and not before.

(8.) And it is further agreed, that the property shall

be transported from the port of Galveston, Tex., to the port of Liverpool, Eng., by the steamer Sandfield, with liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease, the acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship (whether in navigating the ship or otherwise), restraints of princes, rulers or people, inaccuracies, obliteration or absence of marks, numbers or address, loss or damage, resulting from insufficiency in strength of packages, sweating, leakage, breakage, rain, spray, rust, decay, stowage or contact with other goods, risk of lighterage, explosion, or fire at sea, in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, land, rivers and steam navigation of whatever nature or kind soever excepted, however caused or originating (whether any one or more of all such exceptions arise, occur, or in any way occasioned from or by the negligence, default or error in judgment of the masters, mariners, engineers, or others of the crew, or of any of the servants or employes of the ship owners, or otherwise however); and with liberty during the voyage to call at any port or ports, to receive fuel, to load or discharge cargo, or for any other purpose whatever; to sail with or without pilots, to tow and assist vessels in all situations; and in the event of said steamer being full of cargo, or putting back to any port, or being otherwise prevented from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer.

All fines, expenses or losses by detention of or damage to vessel or cargo, caused by incorrect or insufficient marking of the packages or describing the contents thereof, shall be paid by the shipper or consignee of the goods; and the ship owner has a lien upon the goods until the payment of all such costs, charges or damages.

The master is at liberty to lighter the goods, if necessary, at ship's expense, but shipper's risk. Freight payable in cash, free of interest and discount, on the gross landing weight (freights on all liquids to be paid on intake quantity). Goods, if any, which by special agreement herein are to be forwarded from port of discharge to any other port or place, shall be so forwarded at the ship's expense, but at the risk of the owners of the goods, and

shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand and value unknown, and not answerable for leakage or breakage, or incorrect delivery of goods, arising from insufficiency of marks or numbers. Not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee, where the steamer discharges, immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in the warehouse provided for that purpose at port of discharge, or sent to the public store, as the collector of the port shall direct; and when deposited in the warehouse to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. Porterage of the delivery of the cargo to be done by the consignees of the steamer, at the expense and risk of the receivers of the cargo.

In accepting this bill of lading, the shipper or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions, none of which shall be deemed to be rendered void by any custom of ports.

This bill of lading, duly endorsed by consignees, to be given up on demand to agent of steamer, in exchange for ship's copy and order for delivery.

Bonded Goods—Consignee to furnish landing certificates free of expense to the carrier.

Attention of shippers is called to the Act of Congress of 1851.

"Any person or persons shipping Oil of Vitriol, Unslacked Lime, Inflammable Matches or Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note, in writing, expressing the nature and character of such merchandise, to the master, mate, or person or persons in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

The liability of the Gulf, Colorado & Santa Fe Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein.

In witness whereof, the agent signing for the said railway and steamship, or steamship companies, hath

affirmed to two bills of lading of this tenor and date, one of which being accomplished the others stand void.

Dated in Ardmore, Ind. Ter., Oct. 7, 1891.

J. R. MASON,
Agent Gulf, Colorado and Santa Fe Railway Company.

(Endorsed.)

C. L. ANDERSON,
Csh.
WILLIAM DEAN & CO.
Z. BUNELL.

At the May term, 1895, to-wit: May 28th, 1895, the court announced and filed its opinion, which is as follows:

OPINION.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

The Canton Insurance Company, Limited, et al., Appellants, *versus* Claimants of Steamship "Victory" and Claimants of Steamship "Plymothian, Appellees, and Claimants of Steamship "Victory," Appellants, *versus* The Canton Insurance Company, Limited, and Claimants of Steamship "Plymothian," Appellees.	Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

[Argued February 11, 1895. Decided May 28, 1895.]

Before FULLER, Chief Justice, and GOFF and SIMONTON, Circuit Judges.

Argued by Mr. WILLIAM MYNDERSE, of BUTLER, STILLMAN & HUBBARD, for Canton Insurance Company; ROBERT M. HUGHES, of SHARP & HUGHES, for the S. S. "Victory": FLOYD HUGHES, of WHITEHURST & HUGHES, for S. S. "Plymothian."

These are appeals from the District Court of the

United States for the Eastern District of Virginia, sitting in admiralty.

On the 12th November, 1891, the British Steamer Victory, in ballast, was proceeding up Elizabeth river on her way from Hampton Roads to Norfolk. The Steamship Plymothian, on the same day, had left the pier at Lambert's Point, and was proceeding to sea down Elizabeth river. She had a cargo of cotton. The Victory was an iron steamship 338 feet in length, 38½ in breadth, drawing 17 feet aft and 13 feet forward. In officers and crew she had thirty-one men. The Plymothian was 216 feet long; 1,016 net tonnage; her cargo of 3,682 bales of cotton. Her officers and crew numbered twenty-one. Each ship was in charge of a local pilot. The master of each steamship was on the bridge with the pilot acting as lookout, and seeing that the pilot's orders were executed. Neither of the steamships had any other lookout. The channel from the pier at Lambert's Point runs to the channel of Elizabeth river at an angle of about 45 degrees. At black buoy No. 9 in Elizabeth river, the channel of the river becomes nearly if not entirely straight, and runs due north from that buoy on a line to and beyond Craney Island light, the distance between the buoy and the light being one and one-eighth of a mile. The uniform depth of the channel between these two points is 25 feet. At Craney Island the channel is 250 yards in width; at buoy No. 9 the channel is 400 yards in width; outside of the channel on both sides thereof there are large spaces of water, that to the west side being 8 or 10 feet in depth, and on the east side of the channel more shallow.

The Plymothian coming from Lambert's Point had reached the angle of the channel at buoy No. 9, and straightening out again proceeded to sea under a ported helm, keeping to the starboard side of the channel; this was at 4 P. M. At the same time the Victory was seen in the channel of the same river opposite to Craney Island light, a mile and one-eighth off, under a starboard helm; she was about mid-channel or perhaps to the eastward of mid-channel, and moving with the tide about 6 or 7 miles an hour.

The Plymothian was steaming against the tide at the rate of 4 miles an hour. They kept their respective courses without change until collision became imminent, indeed inevitable, when each reversed engines and backed with all speed, but without avail. At 4:14 P. M. the stem of the Victory penetrated the port side of the Plymothean at her main bridge, inflicting so deep a wound that she had to be beached on the bank of the channel

east of buoy No. 7. The owners of each of the steamships instituted proceedings seeking limitation of liability. The Victory has been appraised at $67,500. She claims to have sustained injury from the collision to the amount of $14,000. The Plymothian has been appraised at $33,000. Her freight is valued at $11,871, in all $45,000 and upwards. The actual amount reduced by her proportionate amount of salvage expenses is $40,000. She claims damages arising from the collision to the amount of $42,000. The damage to the cargo is proved to be $72,000. Each steamship intervenes in the proceedings of the other and claims damages for the collision. The owners of the cargo intervene in both proceedings, seeking to hold both vessels responsible. The District Court held the Victory to be solely in fault, and rendered a decree against her, apportioning the sum for which stipulation was given for her *pro rata* between the Plymothean and her cargo. Each party comes up to this court on appeal.

SIMONTON, Circuit Judge:

The experienced and learned judge who heard the case below, after a clear and full statement of the facts, held the Victory liable for the collision, because she violated the great rule of the road, "keep to the right." He applied to her that rule as embodied in Article 21 in the Revised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by an act of Congress March 3rd, 1885, 23rd Statutes at Large, page 438.

The Victory being in a comparatively narrow but deep channel, up which she was proceeding in full view of the Plymothian coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the Plymothian to respond to her signals, thus making a collission inevitable. Article 21 is in these words: "In narrow channels every steamship shall, when safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such ship." The proctor of the Victory contends that this rule does not apply to the navigation of Elizabeth river, as it is not included in the term "upon the high seas or coast waters of the United States." But in the case of the *Brittannia*, 153 U. S., page 130, the Supreme Court of the United States held this Rule 21 binding upon vessels in the harbor of New York at the entrance of East river, and in the *John Knox*, 1 C. C. A. Reports, page 323, the Circuit Court of Appeals of the Second Circuit reached the same conclusion, notwithstand-

ing that the Rule 23d of the Navigation Act appeared to be in conflict with the rule of the Supervising Inspectors in regard to navigation in New York harbor.

The Rules of Navigation in the act of 1885 control all vessels on the high seas and coast waters of the United States. The cases above quoted evidently construe these words "coast waters" to mean harbors and other waters upon the coast communicating directly with the ocean. We would be led to the same conclusion, comparing the language used in the act of 19th August, 1890, 26 Statutes at Large 320. This act has not yet gone into effect, but it is in *pari materia* with the act of 1885, and is intended to modify and improve it. It also has an Article 25, containing the exact provisions of this Article 21, and it declares that the regulations must be followed by "all public and private vessels of the United States, upon the high seas and in all waters connected therewith, navigable by sea-going vessels." The Act of 1895 excludes from its provisions the harbors, lakes, and inland waters of the United States. It is not unreasonable to construe these words, harbors, lakes, and inland waters of the United States, as meaning the Great Lakes and their harbors and inland waters connected therewith, and such rivers as flow in the interior of the country at long distances from the sea. But whatever construction we may give to these words, if we conclude that the Victory in Elizabeth river was governed, not by the regulations of the act of 1885, but by the regulations theretofore in force, embraced in section 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned judge enforced here, "keep to the right."

Not only so, but these regulations in Rule 21 prescribe that every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed or, if necessary, stop and reverse. There can be no doubt that these two vessels were approaching each other, each stubbornly adhering to the same side of the channel, and that their movements involved the risk of collision.

It is contended that the Victory in Elizabeth river was under no special regulation requiring her to proceed on that side of the river channel to her right. But if she were not controlled by the regulation of the act of 1885, or by the regulation set forth in the Revised Statutes, she must have been under some rule established by custom. See *The Vanderbilt*, 6 Wall., 225. The record discloses no custom which authorizes a vessel in this river, proceeding down the channel, to select either side she pleases.

We are of the opinion that the court below did not err in the conclusion as to the error committed by the Victory. But in considering the right of the owners of the cargo to damages, we cannot reach the same conclusion which he did, exempting the Plymothian from all responsibility.

The record shows that the two steamships, at 4 o'clock on a bright afternoon, came into collision in Elizabeth river, a broad and deep stream with ample sea room for each vessel, each having seen the other in full and uninterrupted view when over a mile and an eighth apart. The Plymothian, it is true, was on that side of the river where she should be, and the Victory was on the wrong side of the channel. Yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision. It is true that the Victory committed a very grave error, and her fault is the greater, but this will not excuse the Plymothian."

The rules of navigation leave but little room for mere conjecture in controlling the action of the master and pilot. Each of them has in his power the means of ascertaining with approximate certainty the intention and course of the approaching steamer. He must use them.

"Notwithstanding the error committed by one of the two vessels approaching each other from opposite directions, it did not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent the collision." Rule 24, *Maria Martin*, 12 Wallace, 27; *The Scotia*, 14 Wallace, 181.

"If there be any uncertainty as to the intention of the approaching vessels, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel in reference to her movements. It behooves those in charge to be prompt in availing themselves of every resource to avoid not only collision, but the risk of such a catastrophe." *The Louise*, 3 C. C. A., 330.

As was said by Brtet, M. R., *The Beryl*, 9th Prob. Div., 137: "The basis of the regulations for preventing collisions at sea is for their instruction to those in charge of ships as to their conduct, and the Legislature has not thought it enough to say, we have given you rules which will prevent a collision; they have gone further, and said, for the safety of navigation we will give you rules which will prevent *risk of* collision. It is not enough if you do

only that which will prevent collision; we will give you rules which will regulate your conduct for the purpose of preventing even *the risk* of collision. The words are not if two ships are crossing with the risk of collision, but are crossing so as to *involve risk* of collision." *The Eleanor*, 17 Blatch, 88.

We cannot find anything in this record which shows any precaution taken by the Plymothean when she saw the Victory disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision. Under these circumstances it is impossible to say that the Plymothian is free from fault. It certainly would not be equitable to allow her to go in and share on equal terms in the fund in this court with the cargo, which certainly was in no fault whatever.

The rights of the cargo owners differ entirely from those of the two steamships. They in no way shared in the faults committed, and they are entitled to complete indemnity, *restitutio ad integrum*. The *Atlas*, 93, U. S., (495) 302; *The Alabama and Game Cock*, 92 U. S., 695; *The Virginia Ehrman and The Agnese*, 97, U. S., 316.

In this instance before the court, the cargo must be paid for in full by both vessels. This leads to the embarrassing question, How shall these damages be apportioned between these two vessels? Each of them, as has been seen, was in fault. But the judge who heard the case, and with his usual care and ability examined and weighed the testimony, came to the conclusion that the Victory was grossly in fault, so much so as to be the sole cause of the disaster. Whilst not going to this length with him, this court fully concurs in his conclusion that the Victory was grossly in fault. The Plymothian was guilty of an act of omission. The course of the Victory seems almost wilful. The Victory no doubt was the chief cause of the disaster. If the Plymothian had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances it would seem to be manifestly inequitable to assess upon her one-half of the entire loss.

The loss to the cargo was,	$71,000
The damage to the Plymothean,	33,000
The damage to the Victory,	14,000
	$118,000

Of which one-half is	$59,000
The value of the Plymothean is	$40,000

The rule unquestionably is that when both vessels are in fault, both must contribute to make good the damages. (*The Washington and the Gregory*, 9 Wall., 513; *The Connecticut*, 103 U. S., 710; *The Potomac*, 105 U. S., 630.) And the general rule, almost universal, is to divide the loss equally among the guilty parties, with this qualification: that if one party is exhausted before the person injured is fully idemnified, the deficiency must be made up by the other party. *The North Star*, 106 U. S., 17; *The Max Morris*, 137 U. S., 1; *The Washington and the Gregory*, 9 Wall., *supra*. *The Alabama and the Game Cock*, 2 Otto., *supra*. But this rule cannot be said to be inflexible. In *The Max Morris*, 137 U. S., 1, the question was suggested before the Supreme Court but it was not necessary to pass upon it. The court says: "Whether in a case (496) like this (mutual fault) the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion on it.

The application of an equal division of damages is said to be the *rusticum jus*. Chancellor Kent applies to it that term. 3 Kent Comm., section 231; Marsden on Collision, 2nd Ed., page 133. That is to say, it is an application of that sense of fair dealing and of justice imbedded in our nature, the conclusions of common sense, of a mind "*abnormis sapiens*." If the spirit of the rule be adopted and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the Victory to the loss sustained by the cargo, and by requiring the Plymothean to make up any deficiency, so that the cargo owners obtain complete indemnity.

The cause is remanded to the District Court with instructions to modify its decree in accordance with this opinion.

May, 29, 1895, the following petition of the steamship "Victory" for a rehearing was presented:

PETITION FOR REHEARING.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

CANTON INSURANCE CO., LIMITED,

vs.

STEAMSHIPS VICTORY AND PLYMOTHIAN,

and

CLAIMANTS OF STEAMSHIP VICTORY,

vs.

CANTON INSURANCE CO., LIMITED, AND THE STEAMSHIP PLYMOTHIAN.

To the Honorable Judges of the said Court:

Your petitioners, the claimants of the steamship Victory, in the above entitled cause, respectfully pray for a rehearing on the questions hereinafter mentioned.

It is not thought worth while to apply for a rehearing on the entire merits of the cause. The unusually full arguments in the two courts, and the bulk of the records, forbid it. Suffice it to say that for the purposes of this petition we may assume that on the merits both steamers were in fault for the collision, which is the subject of this litigation. The question then arises, What results were brought about by the settlement of this question, in the opinion? The court holds that although both vessels are in fault, and although the rule is general and almost universal, to divide the loss equally between the guilty parties, yet that this is not an inflexible rule, and that equity requires in this cause that the entire bond of the Victory be exhausted, and that the Plymothian be merely required to make up any deficiency to the cargo owners.

THE UNEQUAL DIVISION OF DAMAGES CAN NOT BE SUSTAINED.

As authority for the proposition that the damages are not equally divided in all cases, the opinion refers to the *Max Morris*, 137 U. S., 1.

It is respectfully submitted that the decision in this case, in so far as it refuses to divide the damage equally between the guilty parties so far as the values permit, is without precedent. The *Max Morris* was a case where a

laborer had received personal injuries on the ship. He libelled the ship for damages, and the defence was made that he himself was in fault, and the real question in the case was whether he could recover at all or not. The arguments of counsel printed in the report were directed to show that, although in collision cases in admiralty the damages were divided, this did not apply to actions for personal injuries, and that they were governed by the old common law rule, that the party in fault could recover nothing, even though the other party was in fault. The opinion so far from holding that in all cases in admiralty it was discretionary with the court whether to divide the damages equally or in other proportions, expressly reaffirmed the rule that in collision cases the doctrine of an equal division is firmly and irrevocably settled, and then addressed itself to show that this rule, conceded to be the rule in collision cases, did not apply to cases of personal injury. See pp. 8 and 9 of the Official Report. See also p. 14, where the failure to divide equally in other admiralty cases was expressly justified on the ground that they were not collision cases. And, therefore, when the opinion says in the head note that "in such cases it is questionable whether the decree should be for half damages, or greater or less," it meant cases for personal injuries; and the distinguished Admiralty Judge who pronounced this opinion, guarding so carefully the doctrine as to equal division in collision cases, would doubtless be much surprised to find that it was quoted to sustain any other than an equal division in collision cases. We believe we can challenge the production of a single case of collision where the damages were divided other than equally; and respectfully submit that the case of the *Max Morris*, (pp. 8 and 9) settles this beyond controversy. We might refer in this same connection to the case of the *Beryl*, 9 P. D., 137, cited in the opinion in another connection.

"The Abeona did everything that was wrong; and then the question arises, Did the Beryl break any of the rules? * * * The Abeona no doubt ought to have acted, but she did not act. She was obstinately going on. What ought the officer on board the Beryl to have done then? He had a right to think she would not have continued her obstinacy. * * * With great reluctance, the conduct of the Abeona having been as bad as it could be, the officer of the Beryl having been put into a difficult position by the obstinate folly and wickedness of the Abeona, all that can be said is, as was said in the Khedive, that he did not do that which the Act of Parliament declares and enacts he must do (for although he did it, he did

not do it at the right time), and for this pardonable, excusable and slight fault, I feel bound to say his owners are liable for this collision equally with the owners of the Abeona."

In that case the Beryl was grossly in fault, and the Abeona only slightly in fault, and yet the court divided the damages equally. In fact, this principle in collision cases has heretofore been considered established.

SEVERAL OF THE APPELLANT'S ASSIGNMENTS OF ERROR SEEM TO HAVE ESCAPED THE ATTENTION OF THE COURT, AND HENCE THE OPINION IS INCOMPLETE.

The appellant's fifth and sixth assignments of error were as follows:

5. The court erred in adjudging costs to the Port of Plymouth Steamship Company, limited, against the Victory, incident to the contest made in respect to fault and negligence of the steamship Plymothean, and also in awarding them costs incident to their proceeding to establish their right to limitation of liability.

6. The court erred in not allowing the petitioners to credit against the bond given by them all the costs in the case, whether incident to the proceeding for limitation of liability or to contesting the question of fault.

Under the decision of the District Judge, holding the Victory solely in fault, various questions of costs came up. These questions must be settled before a complete decree can be entered. The appellant, under the District Court rules, was required to pay all of the District Court costs as a condition of appeal. This is an expressed written rule of the Court for the Eastern District of Virginia, and had to be complied with before the appeal could be effected. Under this rule we and the cargo owners, appellants, have even paid the costs of the Plymothian in the case, including not only the costs incurred by her in trying the question of fault, but also the costs incurred by her in taking steps for limitation of liability. The action of the court in this respect was assigned as error, and it would seem to be very clear, if the Plymothian was in fault, as this court holds, that we should be entitled to recover the costs which we have paid. It would be highly unjust, when both are in fault, to make one of the two pay not only the costs of the cargo owners, but even the costs of the other one who was in fault; certainly no authority can be found for this. In addition to this necessary corollary from the decision of this court, the question whether the Victory has a right to charge the costs paid by her, as a credit on her

bond, or whether she is to be mulcted in the full value of her bond, with interest, and also in the costs, was very earnestly discussed at the argument in this case and in the briefs, although the opinion does not touch upon it. It is not proposed to discuss it again here. The court is referred to pages 4 to 7 of the brief for the Victory, p. 27 of the brief for the cargo owners, and p. 7 of the reply brief of the Victory for this discussion.

The attention of the court is called to the fact that there is now on this docket a case ready for argument (No. 130), in which all the counsel who are counsel in this case will be present. No inconvenience can be caused by allowing a partial argument on these questions just before or just after that case, and the petitioners are willing to be put under any terms at the time, or otherwise, that the court may see fit. In fact he respectfully submits that some discussion, either formal or informal, is essential before a proper decree can be entered upon the opinion, for the reason that it leaves unsettled all these questions of cost, and merely decides the case in reference to the rights of the cargo owners, and does not even state, what must be implied, that the Plymothian also must have her damages scaled. It cannot be the intention of the opinion, after holding the Plymothian in fault, to allow her not only to recover her entire damages, but even her costs.

Respectfully submitted,

PETITIONERS.
By RO. M. HUGHES,
Counsel.

June 5, 1895, the following petition of the Steamship "Plymothian" for a rehearing was presented:

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.
No. 113.

CANTON INSURANCE COMPANY, LIMITED,
vs.
STEAMSHIPS VICTORY AND PLYMOTHIAN;
and
CLAIMANTS OF STEAMSHIP VICTORY
vs.
CANTON INSURANCE COMPANY, LIMITED, AND STEAMSHIP PLYMOTHIAN.

To the Honorable Judge of the said Court:

Your petitioner, the Port of Plymouth Steamship Com-

pany, Limited, of Plymouth, England, claimant of the Steamship Plymothian, and appellee in the above entitled causes, respectfully prays a rehearing of the decision rendered by this court of May 28th, 1895, remanding these causes to the district court, with instructions to modify its decree holding the Victory solely in fault for the collision between the steamships, so as to allow the cargo-owners to collect from from your petitioners such part of their damages as the bond of the Victory fails to pay:

The damages suffered by the cargo-owners aggregating $73,320.88, with interest from December 1, 1891, making a total of principal and interest, as of October 30, 1894 (the date of final decree of district court), of.....	$86,152.03
The bond of the Victory being only.....	67,500.00
The shortage is.....	$18,652.03
with interest from October 30, 1894. Adding to this the damages suffered by the Plymothian, in the collision, amounting to $41,184.12, with interest from December 1, 1891, making as of October 30, 1894, a total of....	49,108.90
The total loss suffered by the Plymothian owners, by this decision, reaches the large sum of	$67,760.93
much larger than that suggested in the opinion of the court, on a basis of one-half liability, held manifestly inequitable.	
And this irrespective of the sum of $4,000 costs, which possibly will also fall on your petitioner, by reason of the shortage of the Victory's bond.	

Your petitioner respectfully represents that this burden, as great nearly as that of the Victory's owners, the fault of whose ship has been held, by both courts, to be so gross as to be almost wilful, is so great as to justify this application for a reconsideration of this case as to the Plymothian's liability.

This court has held, in its decision, that the Plymothian was on the right side of the river, where she should have been, but that she failed to take such precautions as the law directed her to take, to avoid the collision; that the slightest change of course would have prevented the collision.

It is respectfully submitted that she took every precau-

tion possible, to her, in that situation; she could not, in any event, have starboarded her helm and attempted to go to the westward. Such a course would have violated every rule of navigation, and undoubtedly brought on a head-to-head collision, with results disastrous to both vessels, and for which she would, under the law, have been solely responsible. The only course open to her was to continue down the eastern side, under her port helm, and this she did, until at the collission, she was on the very edge of the channel—on the point of grounding.

She is held guilty, by this court, of an act of omission; presumably in not reversing earlier. The evidence establishes, beyond a doubt, that at the time of collision she had entirely checked her headway, with the probability that she had attained a slight backward movement. So held the district judge. What more has the law in any case ever exacted of a vessel? She was, in effect, therefore, at anchor, if not receding, when violently struck by this steamship Victory, whose obstinate and almost wilful course (in the language of this court) had brought on this collision. Had the Plymothian's engines been reversed earlier, in what respect would the situation have been improved? The collision would inevitably have occurred within a few feet to the southward of where it did occur, and with consequences equally as disastrous.

What precautions, therefore, could she have taken that she did not take? The opinion of your honors does not specify them.

Forbidden by every rule known to maritime law to starboard her helm; hemmed in by the shore on the east, where she was on the point of grounding when struck; having reversed her engines in time sufficient to become a stationary, if not a receding, object to the approaching steamer, she performed her every duty in the premises, and any act of omission she can be charged with, cannot have contributed to the collision which occurred.

While it may be truly said that the cargo-owners are in no fault and are entitled to complete indemnity, yet it is submitted that they should not be permitted to have the large deficit made up out of your petitioner, whose loss is already so very large, for a fault held by the court to be very slight, which has not been held to have contributed to the collision, but only "might have prevented the disaster." The attention of the court is directed to the pleadings in the case, in which every point made against the Plymothian has been disproved and found in her favor. The libellants, both the Victory's owners and cargo-owners, having been the libellants in the court below, have, under

the law, the burden of proof on them to show, not only fault on the Plymothian, but such fault as not only *might* but *must* have contributed to the collision. The law is too well settled to need citations on this point. This burden they have failed to carry. The lower court having distinctly held the fault as not contributing to the collision, and this court, although holding the steamer in fault for not adopting precautions, not only not specifying the precautions omitted, but not even holding that such precautions, if adopted, would have prevented the collision. The modification of the decree called for entails a loss of nearly $50,000 on your petitioners, and should be insisted upon by this court only after your honors are convinced of positive and decided fault on the steamship's part, which not only *might*, but *must* have contributed to the collision. It is respectfully submitted that the sums in this case, even though they go to innocent cargo-owners, are too large to be decreed upon indefinite faults and conjectural possibilities.

Exemptions of Bills of Lading.

Here, too, it must be remembered, that these cargo-owners come into court with contracts of affreightment expressly exonerating your petitioner from just such a liability as is now being visited upon them. Although some of the inferior courts have, with the strong arm, set aside these provisions, as being against public policy, it is at least a matter of consideration where this decree in their favor is founded upon their being innocent of fault and entitled to complete indemnity, that these same parties have deliberately entered into a contract with such exemption clauses therein contained. It is submitted, also, that the equities of this case, the large amounts involved, the voluminous record, should induce this court to grant a rehearing as to the validity of these exemption clauses. It was a matter which, on the hearing, was necessarily of little moment until the main questions of law and fact were settled. To these questions counsel directed their attention almost entirely. We refer your honors to our brief (pp. 67–69) where it will be found that, in only three courts, and those district courts, have the *negligence* and *flag* clauses, in one bill of lading, been held void.

Upon this point, of vast importance to the commercial world, we now ask to be again heard.

Court Costs.

The effect of the decision may possibly throw the entire

burden of the large costs of both courts against your petitioner's bond. It needs no argument to point out the hardships of such a result.

Respectfully submitted,

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
By WHITEHURST & HUGHES,
Counsel.

I certify, that in my opinion, a rehearing, as above prayed for, should be granted.

FLOYD HUGHES.

At the same term, to-wit, June 10, 1895, the court made and entered the following order, to-wit:

ORDER DENYING REHEARING.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

CANTON INS. CO., LIMITED, ET AL., APPELLANTS,

vs.

STEAMSHIPS "VICTORY" AND "PLYMOTHIAN," APPELLEES,

AND

STEAMSHIP "VICTORY," APPELLANT,

vs.

CANTON INS. CO., LIMITED, AND SS. "PLYMOTHIAN," APPELLEES.

Appeals from the District Court of the United States for the Eastern District of Virginia.

This cause having been decided at this term, and the claimants of the steamship "Victory," and the claimants of the steamship "Plymothian," by their respective counsel, having presented to the court petitions for a rehearing of the cause, it is now here ordered and adjudged by this court, that the said petitions for a rehearing be, and the same are hereby denied, no judge who concurred in the decree of this court desiring it.

CHARLES H. SIMONTON,
June 10, 1895. Circuit Judge.

At the same term, to-wit, June 10, 1895, the court here made and entered the following decree, to-wit:

DECREE.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

In the matter of the petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, Limited, for limitation of liability as owners of the steamship "Victory."

In the matter of the petition of the port of Plymouth Steamship Co., Limited, for limitation of liability as owners of the steamship "Plymothian."

No. 113.

On appeal from the District Court of the United States for the Eastern District of Virginia.

The appeal taken by John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, and others, owners of the steamship "Victory," and by the Canton Insurance Co., limited, the Triton Insurance Co., Limited, the Indemnity Mutual Marine Assurance Co., Limited, the Atlantic Mutual Insurance Co., the London Assurance Corporation, the co-partnership firm of C. T. Bowring & Co., the Standard Marine Insurance Co., Limited, the British and Foreign Marine Insurance Co., Limited, and the Insurance Co. of North America from the final decree entered in the above entitled proceedings, October 30th, 1894, having come on to be heard, and having been submitted upon the record of proceedings in the District Court of the United States for the Eastern District of Virginia and upon the arguments and briefs of counsel, and due deliberation having been had, it is now ordered, adjudged and decreed by the court that that the said decree be and that it hereby is reversed in the following particulars:

That the said collision was due to the fault and negligence of those in charge of and navigating the said steamship "Victory," and to the fault and negligence of those

in charge of and navigating the said steamship "Plymothian."

That the Canton Insurance Company have and recover the full amount of $8,993.29, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the Triton Insurance Co., Limited, have and recover the full amount of $4,496.64, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the Indemnity Mutual Marine Assurance Co., Limited, have and recover the full amount of $15,149.41, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the Atlantic Mutual Insurance Co. have and recover the full amount of $3,374.91, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the London Assurance Corporation have and recover the full amount of $9,387.48, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That C. T. Bowring & Co. have and recover the full amount of $1,776.27, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the Standard Marine Insurance Co., Limited, have and recover the full amount of $8,774.30, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the British & Foreign Marine Insurance Co., Limited, have and recover the full amount of $2,285.06, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891.

That the Insurance Co. of North America have and recover the full amount of $17,183.61, with interest thereon at the rate of 6 per cent. from the 1st day of December, 1891; and that the said parties also recover jointly the sum of $840.90, being their proportion of the costs of the Port of Plymouth Steamship Co., limited, paid by them as a condition of appeal, and also the further sum of $129.85, the costs adjudged against them in the District Court in respect to the libel filed by them in the name of Ralli Brothers and others, and also the further sum of $316.43, being the proportion of expenses of printing and certifying the record on appeal, and also other costs and other disbursements upon the said appeals.

That the said recoveries of the Canton Insurance Co., the Triton Insurance Co., Limited, the Indemnity

Mutual Marine Assurance Co., the Atlantic Mutual Insurance Co., the London Assurance Corporation, C. T. Bowring & Co., the Standard Marine Insurance Co., Limited, the British and Foreign Marine Insurance Co., and the Insurance Co. of North America, to be paid by the said John A. MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch and the British Steamship Investment Trust, Limited, owners of the steamship "Victory" to the extent of the stipulated value of the "Victory" (after deducting therefrom the amount of their costs incident to establishing their right to limitation of liability, to-wit: $1,138.48 and the costs paid by them to the Port of Plymouth Steamship Co., as a condition of appeal in the amount of $840.90 and their costs upon this appeal to be taxed) with interest thereon from the 30th day of October, 1894, and that the amounts of such recoveries remaining unpaid to be paid by the Port of Plymouth Steamship Co.; and that a mandate issue accordingly to the District Court of the United States for the Eastern District of Virginia, for such further proceedings as may be proper in conformity herewith.

June 10, 1895.

CHARLES H. SIMONTON,
Circuit Judge.

ORDER WITHHOLDING MANDATE.

Filed July 19th, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL., APPELLANTS,

versus

CLAIMANTS OF STEAMSHIP "VICTORY" AND CLAIMANTS OF STEAMSHIP "PLYMOTHIAN," APPELLANTS,

versus

THE CANTON INSURANCE COMPANY, LIMITED, AND CLAIMANTS OF STEAMSHIP "PLYMOTHIAN," APPELLEES.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

It appearing to the Court that it is the intention of the

parties to this cause to apply to the United States Supreme Court for a certiorari to take this record to said court for review, and that the said court does not meet till October next, it is ordered that the clerk withhold the issuing of the mandate in this case until November 1st, 1895.

NATHAN GOFF,

Judge U. S. Circuit Ct. Appeals, Fourth Circuit.

July 18, 1895.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record in the therein entitled cause as the same remains upon the files and records of the said United States Circuit Court of Appeals for the Fourth Circuit.

{Seal of the Court.} In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 1st day of August, A. D., 1895.

HENRY T. MELONEY,

Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

UNITED STATES OF AMERICA, *ss*:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Canton Insurance Company, Limited, *et al.* are appellants and John MacIntyre, Jr., *et al.*, claimants of the steamship "Victory," and The Port of Plymouth Steamship Company, Limited, claimant of the steamship "Plymothian," are appellees, and John MacIntyre, Jr., *et al.*, claimants of the steamship "Victory," are appellants and The Canton Insurance, Limited, and The Port of Plymouth Steamship Company, Limited, claimant of the steamship "Plymothian," are appellees, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the eastern district of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Nos. 353 & 354, October term, 1896. The Canton Ins. Co., Limited, *et al. vs.* John MacIntyre, Jr., *et al.*, and John MacIntyre, Jr., *et al. vs.* The Canton Ins. Co., Limited, *et al.* Writ of certiorari and return thereto.

THE UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari, issued out of the Supreme Court of the United States in the causes therein entitled on the 24th day of October, A. D. 1895, by annexing hereto a certified copy of the stipulation of the attorneys of record in the said causes, that the certified transcript of the record of said causes filed in the clerk's office of the Supreme Court, with the petitions for the said writ of certiorari and the exhibits certified up as originals, may be received and considered as the transcript of the record on the return to the said writ of certiorari.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 27 day of November, A. D. 1895.

HENRY T. MELONEY,
Clerk U. S. Ct. Cl. of Appeals, Fourth Circuit.

In the United States Circuit Court of Appeals for the Fourth Circuit.

THE CANTON INSURANCE COMPANY, LIMITED, *et al.*, Appellants,
vs.
JOHN MACINTYRE, JR., *et al.*, Claimants of the Steamship Victory, and The Port of Plymouth Steamship Company, Limited, Claimant of the Steamship Plymothian, Appellees,

and

JOHN MACINTYRE, JR., *et al.*, Claimants of the Steamship Victory, Appellants,
vs.
THE CANTON INSURANCE COMPANY, LIMITED, and THE PORT OF Plymouth Steamship Company, Limited, Claimant of the Steamship Plymothian, Appellees.

Stipulation.

It is hereby stipulated by and between the attorneys of record for the respective parties in the above-entitled cause that the certified transcript of the record of said cause filed in the clerk's office of the Supreme Court of the United States on the — day of October, 1895, with the petitions for a writ of certiorari herein and the exhibits certified up as originals, may be received and considered as the transcript of the record on the return to the writ of certiorari granted on the 24th of October, 1895.

WILHELMUS MYNDERSE,
For Canton Ins. Co., Limited.
ROBT M. HUGHES,
For Steamship Victory.
FLOYD HUGHES,
J. PARKER KIRLIN,
For Steamship Plymothian.

October 30th, 1895.

Copy.

Plymothian and Victory.

NEW YORK, *Nov.* 8, 1895.

Messrs. Convers & Kirlin.

DEAR SIRS: We have signed and return to you herewith the stipulation which you proposed respecting the return to the writ of certiorari.

We sign it, however, upon the understanding that the "exhibits certified up as originals" include the original bills of lading, and that such bills of lading, if not already certified up, will go up with the inclosed consent.

Very truly, BUTLER, STILLMAN & HUBBARD.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing are true copies of the original stipulations on file in the therein-entitled cause.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony where- I hereto set my hand and affix the seal of the said circuit court of appeals on this 27 day of November, A. D. 1895.

HENRY T. MELONEY,
Clerk U. S. Ct. Cl. Appeals, Fourth Circuit.

[Endorsed:] 757, &c. 16,047. Nov. 29, '95.

[Endorsed:] Case No. 16,047. Supreme Court U. S., October term, 1896. Term Nos., 353 & 354. The Canton Ins. Co., Limited, *et al. vs.* Jno. McIntyre, Jr., *et al.*, & Jno. McIntyre, Jr., & *al. vs.* The Canton Ins. Co. *et al.* Writ of certiorari and return. Filed Nov. 29, 1895.

JAMES H. McKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. ~~[illegible]~~ 366.

IN THE MATTER OF THE PETITION

OF

THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP "PLYMOTHIAN," FOR A WRIT OF CERTIORARI IN THE SUITS OF:

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Appellants,

against

CLAIMANTS OF THE STEAMSHIP "VICTORY" AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees,

AND

CLAIMANTS OF THE STEAMSHIP "VICTORY,"
Appellants,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WHITEHURST & HUGHES AND
CONVERS & KIRLIN,
Proctors for Petitioner.

Supreme Court of the United States,

October Term, 1895.

THE CANTON INSURANCE COMPANY, LIMITED, *et al.*,
Appellants,

VERSUS

Claimants of Steamship "VICTORY" and Claimants of Steamship "PLYMOTHIAN,"
Appellees,

AND

Claimants of Steamship "VICTORY,"
Appellants,

VERSUS

THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of Steamship "PLYMOTHIAN,"
Appellees.

In the Matter of the Petition of the Port of Plymouth Steamship Company, Limited, for a writ of certiorari.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Port of Plymouth Steamship Company, Limited, claimant of the steamship *Plymothian*, in the above entitled causes, respectfully shows unto the Court as follows:

1. On the afternoon of Thursday, November 12, 1891, a collision occurred on the eastern edge of the main ship channel of the Elizabeth River, about half a mile below Lambert's Point, between the British steamship *Victory*, bound up the river to the port of Norfolk, Va., light, for cargo, and the British steamship *Plymothian*, which, bound on a voyage from Galveston, Texas, to Liverpool, with a cargo of 3,682 bales of cotton, had that morning put into Lambert's Point for bunker coal, and was proceeding to sea. In the collision aforesaid the steamship *Victory* was injured to some extent forward, and the steamship *Plymothian*, struck by the bow of the *Victory* on her port side, was so seriously injured that she, in the course of a few moments, with her said cargo, sunk in shoal water on the eastern side of the said Elizabeth River.

2. On November 14, 1891, a libel was filed by S. Elcoate, master of the steamship *Victory*, against the said *Plymothian*, in the District Court of the United States for the Eastern District of Virginia, for damages sustained by the *Victory* in said collision; on November 27, 1891, a libel was filed by the Canton Insurance Company, Limted, *et als.*, owners and underwriters of the cargo of cotton on board the *Plymothian*, and damaged to the extent of $73,000, against both steamships. Answers to these libels were duly filed. On December 3, 1891, the owners of the steamship *Victory* filed their petition for limited liability; and on the same day your petitioner, claimant of the steamship *Plymothian*, filed its petition for limited liability. The preceding libels were then merged in these two limited liability proceedings; answers were duly filed thereafter by the proper parties, and the causes proceeded to hearing. It was ascertained by the Commissioner to whom the matter of damages was referred, that, in the collision aforesaid, the steamship *Plymothian* was injured to the extent of $41,684.12; the cargo of cotton to the extent of $73,320.88; and the steamship *Victory* to the extent of $14,363.80, all of said sums bearing interest from December 1, 1891.

The steamships in said proceedings were duly appraised

and bonded, the *Victory* in the sum of $67,500 and the *Plymothian* and her earned freight (less agreed salvage) at $40,221. The above causes were heard by the District Judge in June, 1894, and in September, 1894, were decided by him, he holding the steamship *Plymothian* without fault in the said collision and the steamship *Victory* solely at fault. On the 30th of October, 1894, the District Court entered its decree in these causes to the above effect, giving a judgment against the bond of the *Victory* in favor of the petitioner for $24,478.78, and of the cargo owners in the aggregate for $41,882.74, and interest from October 30, 1894, being their respective *pro rata* recoveries on the *Victory's* bond of $67,500.

3. From this decision both the cargo owners and the claimants of the *Victory* appealed to the U. S. Circuit Court of Appeals for the 4th Circuit and that Court heard argument in these causes in February, 1895, and on the 28th day of May, 1895, filed its decision affirming the District Judge in his finding as to the fault of the *Victory*, but modifying the decree in respect to the *Plymothian*, holding that she had not adopted the necessary precautions for avoiding the collision, and decreeing full recovery to the owners of her cargo, first, against the bond of the *Victory* to its entire amount, and then over against the bond of the *Plymothian* for the remaining amount due them on their entire loss. The opinions of the District Court and the Circuit Court of Appeals appear in the record filed herewith at folios 447–458 and 498–504 respectively, and are also appended as a part of this petition. Rehearings were asked and denied, but the mandate was suspended until November 1, 1895, to give opportunity to make this application.

4. As a result of this *modification* your petitioner is denied its judgment on the *Victory's* bond of $24,478.78, with interest from October 30, 1894, as decreed by the District Court, and, in addition, is now called upon to pay on its bond to the cargo owners a deficiency of some $20,000, aggregating a total difference of some $46,000 to the *Plymothian*.

5. Upon the trial the following facts appeared and were in substance so found in both courts: The two steamships came into collision at 4.14 P. M. on November 12, 1891, on a clear afternoon, close upon black buoy No. 7, which marks the eastern edge of the 18-foot channel of the Elizabeth River, between Lambert's Point and Craney Island Lighthouse. The charts filed in these causes, the originals of which are before the Court, show the following courses and distances. From Lambert's Point Lighthouse to buoy 9 is 350 yards N. W. by W.; from buoy 9 to buoy 7, the place of collision, 735 yards due north; from buoy 7 to Craney Island Lighthouse 1,200 yards N. ½ E.; width of channel at buoy 9, 450 yards; at buoy 7, 475 yards; at Craney Island, 350 yards. The range of mid-channel, from a point opposite Craney Island Lighthouse to a point opposite buoy 9, is N. ½ E.; the distance about 1⅛ miles. A rough diagram of the channel, &c., is appended.

The steamship *Victory*, Elcoate, master, with a crew all told of 31 men, was an iron ship of 1,774 net tonnage, 338 feet long, 38½ beam, 17 feet aft, 13 feet forward, of draught, and was bound up the river to Norfolk, light, with 400 tons of water ballast and 550 tons of coal.

The *Plymothian*, Mardon, master, with a crew, all told, of 21 men, was an iron ship of 1,016 net tonnage, 260 feet long, 16 feet draft, with a cargo of 3,682 bales of cotton, and was proceeding down the river from Lambert's Point, bound to sea.

Each steamship had its captain on the bridge with a Virginia pilot in charge of navigation. Just as the *Plymothian*, having left Lambert's Point pier, had rounded buoy 9, and had straightened out on her course down the eastern side of the channel, the *Victory*, in coming up from Hampton Roads, was just abreast of Craney Island Lighthouse. This was at 4 P. M.; the vessels were then 1⅛ miles apart, the *Victory*, which had been moving 10 miles an hour, is then alleged to have slackened her speed to some 6 or 7 miles an hour, and the *Plymothian* was moving about 4 miles an hour. The tide was flood, running about 2 miles an hour. The *Plymothian* kept well to the eastern side of the channel on a ported helm.

The weight of evidence shows the *Victory* off Craney Island about mid-channel, though her navigators claimed her to be on the eastern side, while several of the disinterested witnesses place her close over to the western edge of the channel. Upon rounding buoy 9 and straightening out on her course down the eastern side of the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. It was some time before the *Victory* answered, which she at length did with a cross-signal of two whistles; this not until, by a heavy preponderance of testimony, and as admitted by her pilot, Nelson (Record, pp. 331, 340), she was half way between Craney Island and buoy No. 7. The *Plymothian* thereupon blew one signal whistle a second time, and was then promptly answered by a cross-signal of two whistles from the *Victory*, the *Victory* having in the meantime directed her course from mid-channel to the eastern side, and the *Plymothian* being headed down the river close to the eastern edge of the channel.

The steamer *Plymothian* thereupon blew alarm signals and at once backed her engines full speed, continuing the same until the collision. The heavy preponderance of testimony shows, as found by the District Judge, that at the collision, which occurred shortly thereafter, the headway of the *Plymothian* was entirely overcome, and it is possible that she attained a slight backward movement. The *Victory* also blew alarm whistles and reversed her engines, but the headway of the *Victory* was not overcome and she ran into the *Plymothian*, striking her port side with such force as to drive 15 inches into her port side and to render immediate beaching necessary.

At the time of the collision the *Plymothian's* bow was touching buoy No. 7, on the eastern edge of the channel, and in another moment she would, under her port helm, have grounded. The angle of collision was about 60 degrees.

6. The evidence of the masters and crews of the steamships, and four witnesses for the *Victory*, were taken by deposition. The evidence of the licensed pilots of both vessels and 17 of the 21 disinterested witnesses, many of

whom he knew personally, were taken in open Court before the District Judge who has presided in that district for 21 years, and is, of course, thoroughly conversant with the waters in which the collision occurred. Much conflict of testimony was developed on many of the numerous questions at issue.

7. The main allegations of the *Victory's* navigators, as shown by her pleadings, were:

(*a.*) That the *Plymothian* had defective whistles.

(*b.*) That on coming out from Lambert's Point pier, she crosssed over to the western side of the ship channel, and then recrossed to the eastern side when the collision occurred.

(*c.*) That she failed to stop and reverse when danger of collision arose.

(*d.*) That the *Victory* herself was on the eastern side of the channel, and was prevented from taking the western side by several steamers and schooners which were in the river.

On all of these charges the District Judge found strongly against her, a finding which was seemingly followed by the Circuit Court of Appeals, save probably as to the third charge.

The allegations of the *Plymothian* against the *Victory* were:

(*a.*) That the *Victory* was in mid-channel at Craney Island, and failed to keep in mid-channel or on the western side, as the rules of navigation directed.

(*b.*) That she failed to answer the first signal of the *Plymothian* of one blast, for some time, and then replied by a cross-signal.

(*c.*) That she then starboarded her helm and came over to the eastern edge of the channel, down which the

Plymothian was proceeding, thereby causing the collision.

(*d.*) That she was moving at too rapid a rate of speed, and failed to stop and reverse as the law prescribed.

All of which charges were fully sustained by a large preponderance of evidence, and by the findings of both the District Court and the Circuit Court of Appeals, the latter holding her faults so gross as to be almost willful.

8. It does not clearly appear from the decision of the Circuit Court of Appeals wherein it found the fault of the *Plymothian* to consist.

She is found guilty "of an act of omission" merely, and even that is not specified. The District Court found the *Victory* solely at fault; the Circuit Court of Appeals concurred, holding the *Victory* so grossly in fault as to seem almost willful (Record, 503). The District Court held the *Plymothian* to have done everything she should have done; she left her pier and proceeded down the river on the proper course (*i. e.*, the starboard side); at a proper rate of speed; sounding a lawful signal; and the proper one; and the first one; repeating it; and as soon as a change of course on the part of the *Victory* was discovered, at once sounding her danger signals; stopping and reversing her engines; and becoming, by the time the collision occurred, a stationary, if not a receding, object; on the extreme edge of her proper side of the river, where in another moment she would have grounded, and there she was violently struck by a vessel which had grossly violated the rules of navigation. The Circuit Court of Appeals seem, by their decision, to have concurred in these findings as to her course, her speed, her signal, everything, indeed, save presumably in not stopping and reversing earlier. If such be the proper construction of their decision, so far from their having a clear preponderance of testimony to sustain them, the great weight is against their finding that the *Plymothian* should have stopped earlier. The District Judge held that not only did the *Plymothian* stop and reverse the

moment that the obligation was upon her, but so effectually that at the collision her headway was entirely overcome, with a possibility of her having obtained a slightly backward movement.

Not a single one of the numerous disinterested witnesses examined on behalf of the *Victory* venture to speak of the *Plymothian's* speed at the collision. Their silence on this all-important fact is strangely significant. Of course the six witnesses examined from the crew of the *Victory* state that the *Plymothian* failed to reverse, but an examination of their testimony discovers it to be so self-contradictory and exaggerated as to be of little weight. The witnesses from the *Plymothian* and the record evidence show conclusively that her engines were reversed four minutes before the collision, and that at the collision her headway was entirely checked, some stating that she was possibly making sternway.

See Engineer's Log, *Plymothian* (R., p. 282); Scullard (R., pp. 166–168); Cronquist (R., p. 174); Pearse (R., p. 179); Lyons (R., p. 211); Baird (R., p. 232); Wood (R., pp. 239 240); Schroder (R., p. 203); Lyons (R., p. 211); Ham (R., pp. 185–186–193); Mardon (R., pp. 265–266); Pilot Henley (R., p. 362).

This much more than outweighs the testimony of the *Victory's* crew; but to render it conclusive the following eye-witnesses, viewing the colliding vessels from different points, entirely corroborate the statements of the *Plymothian's* crew.

Etheridge (R., p. 355); Goodwin (R., pp. 374–375); Clark (R., p. 388); and Wynne (R., p. 405); all of them licensed tugboat men, whose daily life is led in these waters, and whose integrity, accuracy and skill cannot be questioned. The finding of the District Judge is justified, indeed demanded, by the testimony on this point, and its reversal on appeal cannot be sustained in law or in fact.

9. The modification made by the Circuit Court of Appeals in the decision of the District Court seems to have been based chiefly upon a difference of opinion upon a question of law as to when the duty attached to the *Plymothian* to stop and go astern, and in part upon a

4080

question of fact as to when the risk of collision became involved.

The District Judge apparently rested his decision exonerating the *Plymothian* for failure to stop and back at an earlier moment, upon the ground that risk of collision did not become involved by the mere blowing of whistles, at a time when the vessels were above three-fifths of a mile apart and there was plenty of room to repent and do right even after whistling wrong, but only became involved when the *Victory*, pursuant to her wrongful cross signal, changed her course from one that would have carried her clear of the *Plymothian* along the westerly side of mid-channel, to a course towards or crossing that of the *Plymothian* on the easterly side; and that then and immediately the engines of the *Plymothian* were stopped and reversed with the effect of entirely overcoming her headway and possibly putting her under some sternway, before the wrongful maneuvers of the *Victory* brought her into the *Plymothian's* port side.

The Circuit Court of Appeals apparently takes the view (which certainly cannot be said to be sanctioned by such a preponderance of evidence as a Court of Appeals ought to find to warrant it in disturbing a finding of fact made by a District Judge, who had seen the witness), that the vessels "were surely approaching each other" [so as to involve risk of collision], and that after they began so to approach "each doggedly kept her course, without taking any precaution whatever until too late, and when the pending collision became inevitable."

The passage referred to in the opinion of the Circuit Court of Appeals is as follows:

"The *Plymothian*, it is true, was on that side of the river where she should be, and the *Victory* was on the wrong side of the channel; yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision."

It is submitted with great confidence that that finding not only is not supported by such a preponderance of proof as should warrant an appellate court in reversing a finding of fact in the District Court, but that the preponderance is distinctly the other way on the record. The line of the centre of the channel runs North ½ East. When the *Plymothian* was close to buoy 9, near the easterly edge of the channel, the *Victory* was about mid channel and opposite Craney Island Light. It is evident, therefore, that if both vessels had maintained those courses no collision would have resulted. It is not denied that the *Plymothian* never left the easterly edge of the channel, but maintained a steady course along that side. The *Victory* does not claim to have changed her course until about half way between Craney Island Light and Buoy 7, the place of the collision. Up to that time, therefore, the vessels were not approaching each other so as to involve risk of collision, and no duty so far attached to the *Plymothian*, which was proceeding at a very slow speed, to check down or stop. The very great preponderance of evidence shows that as soon as the *Victory* began to change the *Plymothian* stopped and backed and overcame her headway, if indeed she did not attain sternway. She did not proceed on her course for an instant after the *Victory* changed her course from one of safety to one of peril. It is confidently submitted, therefore, that the finding of the Circuit Court of Appeals, "that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable" was not justified as a finding of wrongful navigation on the part of the *Plymothian*, and was a departure from that safe and salutary rule which forbids a Court of Appeals, upon conflicting evidence taken before a District Judge familiar with the waters and circumstances, to reverse the finding of the lower court as to an essential question of fact.

10. The omission of the *Plymothian* to reverse earlier, if a fault at all, is not shown to have contributed to the collision.

The Circuit Court of Appeals expressly held that the

Plymothian was on the starboard side of the channel, her proper side, when the first signals were sounded, and so continued until the collision. The *Victory* gave no signs of starboarding her helm and keeping to the East until after her first signals were blown, admittedly not until she was at least half way between Craney Island and buoy 7 (Nelson, R., pp. 331–340). The *Plymothian* was therefore at least halfway between buoy 9 and buoy 7, and only 300 yards from the point where the collision occurred, when the chances of collision could have for the first time become involved. She is now charged with failing to take legal precautions; that the slightest change of course would have prevented the collision. It is respectfully submitted that she took every precaution possible to her in that situation. She could not in any event have starboarded her helm and attempted to go to the westward. Such a course would have violated every rule of navigation, and undoubtedly brought on a head-to-head collision, with results disastrous to both vessels, and for which, under the law, she would have been clearly responsible. She could not port her helm more and go farther to the eastward than she did, for at the collision she was on the point of grounding on the eastern edge of the channel. She had reached her limit on that side. In a narrow channelway only 450 yards wide and narrowing, even the slightest change of course is not always open (as intimated by the appellate Court in its opinion), to a large ocean-going steamship nearly 300 feet long with heavy cargo. Nor would "the slightest change of course" on the part of the *Plymothian* have relieved the situation. She had been navigated, as she ought to have been, on the theory that the *Victory* would pursue her proper course (*i. e.*, to the middle or western side of the channel). The first moment she could have perceived that the *Victory* was disregarding her plain duty was when the *Victory* was half way between Craney Island and buoy 7, and she herself only some 300 yards from the point of collision, and at that time she reversed. She is held in fault for omitting to take precautions. What precautions? Forbidden by every rule known to maritime law to starboard her helm;

hemmed in by the shore on the east, she could only stop and reverse; and this she did, so effectually, and so promptly, as to become at the collision a stationary, if not a receding object to the approaching steamer.

What more do the principles of the admiralty law exact, what more has any decided case ever demanded, of a vessel? She was in effect at anchor, if not receding, when violently struck by the steamship *Victory*, whose obstinate and almost willful course had brought on the catastrophe. If she could or should have reversed a moment earlier, as the Court of Appeals says was her duty, in what respect would the situation have been improved? The only effect would have been to place her a few feet further south of buoy 7, where the *Victory* would doubtless have struck her with practically the same if not worse effect.

What precautions, to avoid collision, therefore, could she have taken that she did not take, and in what respect could such failure have contributed to the collision? No precautions were omitted. At most they were only delayed. Her fault, if any, is not therefore a statutory fault which imposes upon her the burden of showing it could not have contributed to the collision, but is only, on the finding of the Court of Appeals, a slight species of negligence in navigation—*i. e.*, in judgment as to when risk first became involved.

The decision of the Circuit Court of Appeals does not state that this omission or error of judgment contributed to the collision; it merely holds that "the disaster might have been prevented."

This is not sufficient as matter of law. The *Victory*, having violated the rules of the road in taking her course to the East, disregarding our proper signal to pass port to port, and replying with a cross signal, assumed the risks of navigation, and the *Plymothian* having stopped at the approach of risk and being stationary or backing at the collision, and thus having obeyed the statute, the burden is on *Victory* to show that mere delay on the part of the *Plymothian* in obeying the statute, not only *might*, but *must* have contributed to the collision. This burden of proof she has signally failed to carry, as an inspection of the record will demonstrate. A careful reading of the

4682

testimony of the pilot of the *Victory*, Nelson (R., pp. 329-346), will disclose his obstinacy and utter disregard of the rules of navigation and demonstrate the impracticability of the *Plymothian* doing anything to avoid the consequences of such reckless negligence.

11. The cargo owners have no equitable standing to demand complete indemnity.

The opinion of the Circuit Court of Appeals discloses that the Judges evidently arrived at the conclusion they did in respect to the *Plymothian*, from a desire to give full recovery to the cargo owners, who were regarded as innocent sufferers, in no way sharing in the faults committed.

While it is true that the cargo owners did not participate in any faults, if any such were committed on the part of the *Plymothian*, yet they stand before the Court as having, for a valuable consideration, entered into a deliberate contract, whereby the steamship should not be held responsible to them for any loss or damage from collision, "even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or the other servants of the shipowner." Although some of the inferior Courts have, with the strong arm, set aside these provisions in a bill of lading relating to neglect of the ship's crew, as being against public policy, it is at least a matter of consideration, when the decision of the District Court on a question of fact, with conflicting testimony, is set aside by the upper Court from a desire to decree complete indemnity to innocent sufferers, that these same parties have deliberately entered into a contract with the shipowner that he should not be responsible to them for damages arising from the fault of his servants at a time when he could not control them, or of a pilot forced upon him by the law. No equity can be raised in their favor in such circumstances, and surely it cannot be that the stern demands of a great public policy require the Court to set aside a contract relieving the shipowner from liability for the fault of a compulsory pilot whom he cannot select or control.

12. The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

It will appear (by stipulation and exhibits, R., pp. 483–498) that every bill of lading issued by the master of the *Plymothian* for the cotton constituting this cargo, and injured as a result of this collision, contained two clauses, familiarly known as the "negligence" clause and the "flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage oc-
" casioned * * * by collisions, stranding or other accidents
" of navigation of whatsoever kind (even when occasioned
" by the negligence, default or error in judgment of the
" pilot, master, mariners or other servants of the ship-
" owner) * * *" (R., 487–489–490).

It must be conceded that if fault was committed on the part of the *Plymothian*, it arose from the negligence, default or error in judgment of the *Virginia* pilot, who was in charge of navigation, and was thus clearly within the foregoing exemption, if permitted to stand. Negligence, if any, on the part of her officers is equally within the exemption.

The "Flag" clause is as follows:

"This contract shall be governed by the law of the flag
" of the vessel carrying the goods, except that general
" average shall be adjusted according to York-Antwerp
" Rules, 1890. In accepting this bill of lading, the shipper,
" owner and consignee of the goods and the holder of the
" bill of lading agrees to be bound by all its stipulations,
" exceptions and conditions, whether written or printed,
" as fully as if they were all signed by such shipper,
" owner, consignee or holder, any custom of the port not-
" withstanding" (R., 488–492).

By stipulation it is an agreed fact that the steamship *Plymothian* is, and was at the time of the shipment of said cargo, and subsequently of the collision, a British vessel, and sailing under the British flag (R., 484).

By stipulation it is further agreed that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the brief and upon the arguments of counsel to such printed reports, as proofs in this case of the law of Great Britain in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the records (R., 484).

It cannot be, and has not been in the courts below contended by the learned counsel for the cargo owners, that the British law does not sustain these exemptive clauses. Their courts uniformly uphold their validity.

See as proof of the British law under the above stipulation: The *Duero*, L. R., 2 Adm. & Eccl., 398; Taubmann *vs.* Pac. Steam Nav. Co., 26 L. T. N. S., 704; Steel *vs.* State Line S. S. Co., L. R., 3 App. Cas., 72; Manchester S. & L. R. Co. *vs.* Brown, L. R., 3 App. Cas., 703; Grill *vs.* General Iron Screw Collier Co., L. R., 1 C. P., 600; The *Cressington*, L. R., 1 Prob., 152.

It is well known, and the foregoing cases fully prove, that negligence clauses are valid and binding under the British law.

The question now is, will American courts, in a case where British insurance companies (R., 4–5), are seeking to recover of a British vessel for the loss on goods shipped under bills of lading expressly freeing the vessel from such responsibility, and further providing that the laws of England shall govern the contract, set aside the deliberate contracts of the parties on the general grounds of public policy, and refuse to apply the Law they have selected as that under which their contract should be expounded.

This important question, of consuming interest to the whole commercial world, has been passed by in the decision of the Circuit Court of Appeals and a great liability placed on your petitioner, without one expression or comment on the part of the Court.

This question is one of great importance in Private International Law, and it has not yet been expressly answered in the Supreme Court; but in Liverpool Co. *v.*

Phenix Ins. Co., 129 U. S., 397, at page 458, the Court appears to have intimated that in a case like the present the contract should be upheld.

13. It is believed that the consequences of the "modification" of the lower court's decree by the Circuit Court of Appeals are very much larger than were contemplated by the Court when rendering the decision. The opinion says (p. 503):

"The *Plymothian* was guilty of an act of omission. *The course of the Victory seems almost willful.* The *Victory* no doubt was the chief cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances, *it would seem to be manifestly inequitable to assess upon her one-half* of the entire loss."

It further says (p. 504):

"If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* [$67,500] to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency [the cargo damage was $71,000], so that the cargo owners obtain complete indemnity."

Inferentially, the Court only intended to impose upon the *Plymothian* this deficiency of $3,500, with, perhaps, a slight addition for costs.

In the District Court the *Plymothian* had been permitted to recover her own damages *pari passu* with the cargo damages against the bond of the *Victory*. *Plymothian's* damages amounted to $41,684.12, with interest from December 1, 1891. Permitting the cargo owners to take the whole of the *Victory's bond*, necessarily excluded the *Plymothian* from *pro rating* her own damages, as she had in the District Court, whereby she lost $41,684.12 and interest, and as the Court of Appeals, in its final decree (Record, 514), has allowed the cargo interest, the result is that the *Plymothian* will have to make up a deficiency of $20,000 instead of $3,500 to the cargo. Instead, therefore, of having only to make up a supposed deficiency of $3,500, as a careful reading of the opinion of the Court of Appeals

would indicate she was adjudged to do, the modification of the decree of the District Court in fact means a loss to the *Plymothian* of about $70,000, or within about $10,000 of the amount she would lose on an equal division of damages.

Another effect of this decision was to cast the entire burden of the costs of this heavy and expensive litigation in both lower Courts upon the petitioner, a result most extraordinary and inequitable.

11. Your petitioner avers that questions of gravity and importance are involved sufficient to justify the exercise of the extraordinary jurisdiction vested in this Court to issue a writ of *certiorari*, requiring the cause to be brought to this Court for its consideration and decision. The whole of the damages, with accrued interest, amounts to approximately $160,000.

A foreign vessel traversing a channel leading from the port of Norfolk, navigated, as your petitioner believes, in strict accordance with the rules of navigation, has been adjudged to pay a large sum of money upon the finding of a slight omission, which, in the opinion of the Court, it would be "manifestly inequitable" to adjudge to be such a fault as has heretofore, in the Federal jurisprudence, been deemed essential for fixing upon her any portion of collision damages, and moreover, has been denied the benefit of an exemption in her bills of lading, relieving her from the fault of a pilot, whom the master was by law bound to employ, and whom he could not control, and from the error of judgment or neglect of his servants in navigating the ship. Notwithstanding the bills of lading were freely and voluntarily made and delivered, and that it was therein expressly stipulated that all questions arising under the contract were to be adjudged and decided under English law, the benefit of the said exemptions construed by English law was not only denied to the petitioner, but the Court apparently, as may be inferred from the opinion, gave them no adequate consideration.

Further important questions in the cause brought up upon the petition filed by the *Victory*, relate to an unequal division of damages in cases of maritime torts, and to

the application of the International Regulations in such channels as the Elizabeth River, where this collision occurred. The first of these has a bearing upon the rights of this petitioner, in that should the Supreme Court be of the same opinion as the Court of Appeals, that it would be "manifestly inequitable" to apportion the damages equally, and should reach the conclusion that an unequal division is not sanctioned by our jurisprudence, it would annul that portion of the decree, and would restore the decision of the District Court, which wholly exonerated the *Plymothian*.

No damages can result to any of the parties in interest by reason of the allowence of a writ, as the bond of the *Plymothian* is more than double the amount decreed to the cargo owners, and bears sureties approved by their counsel.

15. Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will, on or before the 1st day of November, 1895, to which time the mandate of the Circuit Court of Appeals has been suspended, cause the writ of *certiorari* to be issued, pursuant to the power vested in this Court by an act of Congress, entitled "An Act to establish Circuit "Courts of Appeal, and to define and regulate in "certain cases the jurisdiction of the Courts of the "United States, and for other purposes," approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the Fourth Circuit to certify the whole record and causes to this Court for consideration, and that thereupon this Honorable Court will decide the whole matter in controversy in the same manner as if the causes had been brought to this Court for review by appeal.

And your petitioner will ever pray, &c.

THE PORT OF PLYMOUTH STEAMSHIP CO., LIMITED.
By
WHITEHURST & HUGHES and
CONVERS & KIRLIN,
Its Proctors.

4085

STATE OF VIRGINIA, }
County of Washington, } ss.:

FLOYD HUGHES, being duly sworn, makes oath that he is one of the proctors for the petitioner herein, and as such has had personal charge for said petitioner of the case in the foregoing petition mentioned in the District Court of the United States in the Eastern District of Virginia and in the Circuit Court of Appeals for the Fourth Circuit; that he has read the foregoing petition and the same is true to the best of his knowledge and belief. He further says that the petitioner is a foreign corporation, organized and existing under the laws of Great Britain, and that this petition is made and presented by due authority, and that the foregoing application is meritorious and not made for the purpose of delay.

FLOYD HUGHES.

Sworn to and subscribed before me this 23d day of September, 1895.

[SEAL.]

J. C. FOWLER,
U. S. Comr. for W. D. V. A.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded, and the case is one in which the prayer should be granted by this Honorable Court.

J. PARKER KIRLIN,
Of Counsel.

Opinion of the District Court.

U. S. DISTRICT COURT AT NORFOLK.

September 1, 1894.

In the Matter of S. ELCOATE, Master of the Steamship "VICTORY"

vs.

The Steamship "PLYMOTHIAN."

In the Matter of the OWNERS of the "PLYMOTHIAN'S" Cargo

vs.

The Steamers "VICTORY" and "PLYMOTHIAN."

IN THE MATTER

OF

The Petition of the "VICTORY'S" OWNERS for a Limitation of Liability.

IN THE MATTER

OF

The Petition of the "PLYMOTHIAN'S" OWNERS for a Limitation of Liability.

IN ADMIRALTY.

Statement.

On the 12th day of November, 1891, the steamers *Victory* and *Plymothian* came in collision in the Elizabeth River, between Lambert's Point and Craney Island Light. It was in broad daylight, at 4.14 P. M. of a clear day.

At the time of collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea; having left Galveston November first, with a cargo of cotton, bound to Liverpool; and having, in the prosecution of that voyage, come in through Hampton Roads and taken coals at Lambert's Point, Norfolk.

By the collision, the portside of the *Plymothian* was cut below the water's edge near amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability. The value of the *Victory* has been appraised at $67,500, and her owners have given stipulation for that amount.

The value of the *Plymothian* has been appraised at $33,350, and the value of her freight at $11,871, making a total of $45,221, which is to be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. The amount of her owner's liability will therefore be about $40,000.

In response to citations issuing in these proceedings, the damages arising out of said collision have been assessed. Those sustained by the owners of the *Victory* have been assessed at about $14,500. Those sustained by the owners of the *Plymothian* have been assessed at about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo have been assessed at about $72,000.

In stating what I conceive to be the facts of this case, derived from a huge mass of conflicting testimony, I shall be in frequent conflict with evidence given on one side or the other in the case. Owing to the unusual volume of this evidence, it will be impracticable for us to analyze the statements of witnesses as to each fact, and to show why any fact which I have stated has been adopted. The task would be great and its execution tedious, and it has been rendered unnecessary by the usually elaborate and able discussions of the evidence which have been submitted by counsel on either side in their briefs.

The *Victory*, Elcoate, master, was an iron ship of 1,774 net tonnage, 338 feet in length, 38½ in breadth, with 17 feet aft and 13 feet forward of draft. She had on 400 tons of water ballast and 550 tons of coal. Her number of officers and crew was 31.

The *Plymothian*, Mardon, master, was 260 feet long, 1,016 tonnage net; had a crew all told of 21 men, and had a cargo of 3,682 bales of cotton. She responded with exceptional facility and promptness to her helm.

The two vessels were actually navigated by their respective pilots, Nelson on the *Victory* and Henley on the *Plymothian*. The masters of the two vessels were each on the bridge with the pilot, each acting as lookout, and seeing that the orders of the respective pilots were executed. Neither ship had a special lookout forward of the bridge in her bows. Several members of each crew were examined as witnesses in the case. All were respectively offered and ready to be examined.

The collision occurred close upon what is now black buoy 7, which marked the eastern side of the 18 foot channel between Craney Island Light and Lambert's Point Light, in Elizabeth River. The course of the channel up the river from Craney Island Light to black buoy 9 is

nearly south; and the channel at buoy 9 turns southeastward towards Norfolk, at an angle of about 65°. But the course coming out from the coal pier at Lambert's Point into the channel, around buoy 9, turns an angle of about 45°. According to a chart of this channel (Exhibit X.) filed by counsel for the *Victory*, the distance from Craney Island Light to buoy 7 is 1,200 yards, or about $\frac{2}{3}$ of a mile, and to buoy 9 is 1,967 yards, or $1\frac{1}{8}$ miles, the distance between the two buoys being 735 yards, or $\frac{3}{8}$ of a mile. The channel here is easily navigable for ships drawing 25 feet of water; its breadth at Craney Island, 250 yards, and at buoy 9, a mile and an eighth south, is 400 yards, broadening as it extends.

Below Craney Island Light, as the river Elizabeth flows, the channel stretches three miles and a half in a straight course, due north, into Hampton Roads, opposite Sewall's Point. There is no obstruction to the view over the entire length of the channel between Sewall's and Lambert's Points, except by such vessels as may happen to be lying near or passing along the channel.

On the western side of the channel, south of Craney Island as far as buoy 9, very spacious waters expand to the shore, which are navigable for a distance of twice the width of the channel for vessels of 8 or 9 feet draft.

East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however; and owing to the eastward bend of the channel around buoy 9 to Lambert's Pier, navigators coming up from Craney Island are apt to head directly for Lambert's Point Light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, and are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel.

It was in the channel and waters thus described that the collision which has been mentioned occurred. Each ship had on board, as required by law, a licensed pilot, taken up at the Virginia Capes. The *Victory* was coming into Norfolk in ballast. The *Plymothian*, having come in for coal, was going out on her voyage to Liverpool.

Just as the *Plymothian*, having left Lambert's Pier, had

rounded buoy 9, and had straightened out on her course down the channel, the *Victory*, in coming up from Hampton Roads, had got just abreast of Craney Island Light. It was at about 4 P. M. that the two ships were thus in motion, and began to approach each other at a distance apart, at the start, of a mile and an eighth.

The *Victory* had been moving at the rate of ten miles an hour; but at Craney Island she slackened her speed and proceeded up the channel at the rate of six or seven miles an hour, with a two-mile flood tide assisting her.

The *Plymothian*, on straightening out at buoy 9, had begun to move against the tide at the rate of about four miles an hour. The *Plymothian* moved on a ported helm and kept well to the east side of the channel. The *Victory*, which, at Craney Island Light, was at mid-channel according to most of the evidence, but on the eastern side, according to her own testimony, moved, after or from the time of passing Craney Island Light, on or to the eastern side of the channel, under a starboard helm. Each vessel moved so long on these courses under the helms respectively mentioned that when the collision which was threatened became imminent, and each reversed engines and backed with all speed, they did so ineffectually. The *Plymothian's* headway was checked, but she had little backward movement, if any, at the time of collision. The *Victory's* headway was not stayed, and she was still moving forward at the moment of collision. The stem of the *Victory*, at 4.14 P. M., came into the port side of the *Plymothian* at her main bridge, inflicting so deep a wound that she immediately beached on the bank of the channel east of buoy 7.

Shortly before sounding three whistles and reversing her engines the *Victory* had a schooner close under her starboard side, which prevented her from porting her helm. She had previously met two other schooners on her starboard side. All three of these schooners were on the east of mid-channel, bound out to Hampton Roads.

It would seem to be useless to consider how either vessel had moved before the time when, one of them being at Craney Island Light and the other off buoy 9, they began at the hour of 4 P. M. to approach each other in the

open channel. But it may as well be premised that the *Plymothian* had not before then, in coming out from Lambert's Pier, gone over to the west of the channel near to red buoy 22; and had not, after doing so, re-crossed the channel to reach its position near buoy 9, as claimed by the *Victory's* counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect. Nor was the west side of the channel, as seen that afternoon from Craney Island Light to red buoy 22, lined with numerous vessels at anchor to a degree obstructing that side of the channel, as claimed by the same counsel. There were barges and other craft anchored near the red buoy, but not as many as usual. The weight of testimony is, that the western part of the channel, so far, at least, as abreast of buoy 7, was free from obstruction. The *Victory's* own witnesses place such schooners as that steamer met after passing Craney Island, east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rule, to take the eastern side. Moreover, the claim of the *Victory's* crew, that each of three steamers which she met in coming from Hampton Roads up Elizabeth River gave her two whistles and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers and by all the witnesses in the case who testified that when she had reached Craney Island she was in mid-channel. The preponderance of testimony in favor of her being in this last-named position is so great as to be conclusive of the fact. The only steamer whose crew was not examined on this point was a foreign tramp, and her testimony could not be obtained. But that vessel was met in Hampton Roads, three miles from where the next steamer was met, and there was space and time abundant for the *Victory* to pass to the proper side of the channel after meeting the tramp. Even if the two other steamers had passed on her starboard side, which they deny they did, their distance apart was ample for allowing the *Victory* to pass between them to the western side of the channel if she had desired to do so. Nor, indeed, did the *Victory* (if in fact she had been pressed by the three steamers

to the eastern side of the channel, and was held there when she Craney Island by a sort of marine duress), at any time after sighting the *Plymothian*, give her alarm signals or any sort of notice that she was on the east side of the channel by a compulsion which she could not throw off.

I consider it proved beyond reasonable doubt, that the *Victory* and *Plymothian*, at 4 P. M., on the afternoon under consideration, one of them in mid-channel abreast of Craney Island Light, and the other in mid-channel abreast of buoy 9, were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction, or let or hindrance of any kind.

Much evidence was taken pro and con on each side, upon the question of the seaworthiness of the whistles of the two steamers. The result of the elaborate testimony taken on this question is to show that the whistles of both steamers were as good as those of English steamers usually are, and were in good working order.

After rounding buoy 9, and straightening out on her course down the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. It was some time before the *Victory* answered; which she at length did with a cross signal of two whistles.

Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was half way between Craney Island Light and buoy 7. The *Plymothian* thereupon blew one signal whistle a second time, and was then promptly answered by a cross signal of two whistles by the *Victory*. The two steamers thereupon, and at the same time, blew alarm signals and at once backed their engines at full speed; and this backing of engines continued until the collision occurred.

The headway of the *Plymothian* was overcome, and it is possible she attained a slight backward movement. The headway of the *Victory* was not overcome, and she ran into the *Plymothian's* broadside with such force as to drive fifteen inches into her side and to render immediate

beaching necessary. She penetrated fifteen inches into the *Plymothian*, notwithstanding the fact that the angle of incidence with that ship was sixty or seventy degrees.

Opinion.

HUGHES, *J.*: It is obvious, from the foregoing statement, that the question in the case under consideration is, whether or not it is governed by the great rule of the road: "Keep to the right." That rule is embodied, as Article 21, in the Revised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by the Act of Congress of March 3, 1885, 23 Statutes at Large, 438 *et seq.* The act declares that they shall constitute the rules for the navigation of vessels "upon the high seas and in all coast waters of the United States, except such as are otherwise provided for." The exceptions alluded to are defined by the act itself, in the section declaring, that "nothing in these rules shall *interfere with the operation of a special rule*, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation." The *rule* only is excepted, not the coast water itself.

The act of Congress prescribing these rules is a *law*, of which all the world must take cognizance. Special rules of local ordination are not laws, but rules only; and, in order to be binding, must be brought home to the knowledge of navigators, and proved affirmatively in the courts. I know, however, of no provision of such local rules, so far as they affect our Eastern waters navigable from the ocean, which conflicts with the International rules adopted by Congress, and prevailing, by general adoption, the world over.

Those general rules of the world at large, adopted and made laws of the United States by Congress, are in force in the oceans and seas off our coasts, and in all the coast waters of the country, that is to say, in the rivers, bays and roadsteads opening into the ocean, and "allied to ocean navigation from being used and necessarily used by all ocean bound vessels," and vessels coming in from the

outer waters. These rules would be paralyzed if they ceased to operate in favor of ocean ships as soon as they passed within lines drawn between points of land projecting into the ocean. That they are intended to be in force and operation within such lines is proved by their very terms. Article 21, which has been mentioned, would be a meaningless nullity under a contrary contention. Its language is: "In narrow channels every steamer shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard of such ship."

Except in the instances of two or three great straits in different parts of the world, so few in number and each so wide that no rule is necessary in regard to them, no such narrow channels as Article 21 contemplates are to be found beyond lines drawn between the great *fauces terræ* of our seaboard. The contention that this important article applies only to the outer seas would exclude Chesapeake Bay, Hampton Roads and Elizabeth River from the category of "coast waters." That bay has been called the Mediterranean of America from the vast and varied commerce that floats upon it carried largely in ships of the ocean.

Hampton Roads, from the depth of its waters, its spacious area and its land locked conditions of safety is a favorite resort in storms for all vessels that navigate our Atlantic seaboard. Elizabeth River carries a channel of 25 feet in depth and from 250 to 500 yards in width all the way from Hampton Roads to the National Navy Yard at Gosport. It would be imposing hard lines upon foreign steamers and sailing ships coming up to Norfolk with and for heavy cargoes, for the Courts to repeal Article 21 as to a river traversed so constantly by sea-going ships of the largest size and capacity as the Elizabeth River is—an article known to all navigators from every part of the earth—and to dwarf the river into a local harbor, subject to the provincial domination of a town council, and to the crude regulations of ever changing town officials.

It may not be practicable to define with precision the meaning of the phrase "coast ocean waters." But so far as this Court is concerned I hold that it embraces all wa-

ters opening directly or indirectly into the ocean and navigible by ships, foreign or domestic, coming in from the ocean, of draught as great as is drawn by the larger ships which traverse the open seas. I hold that all tide waters, navigable from the ocean, with navigable depth for ocean craft, are coast waters in the meaning of Article 21.

The Elizabeth River between Norfolk and Hampton Roads is one of the ocean waters, and the International Rules of Navigation are therefore in full force and operation in that river.

Elizabeth River is not embraced within the meaning of the clause of the Act of Congress, providing that "a special rule duly made by local authority relative to the navigation of any harbor" shall not be *interfered with* by the International Rules of Navigation. If the river is a harbor at all, it is only as a part of the harbor of Norfolk. But it is not within the territorial limits of Norfolk, and is not subject to any municipal regulation in force within that corporation. It is competent for Norfolk to ordain rules of navigation for her own harbor; but these rules lose their authority when the territorial boundaries of the city either on land or water are passed. But even if this were not so, it has not been shown that any rule of navigation ordained by Norfolk for the government of shipping within her own harbor, is in conflict with Article 21, or with any other law of navigation embodied in the International Rules. If so, if there be no municipal rule of navigation in force in Norfolk harbor with which Article 21 or any other International Rule *interferes*, then Norfolk harbor is itself subject to those International Rules, and is in the category of "coast waters" contemplated by the Maritime Act of Congress of March 3, 1885. Those rules are in force in Elizabeth River independently of any rules ordained by Norfolk, and they are in force in Norfolk harbor itself, as long as they shall not *interfere* with any rule of navigation which may be enacted by the local municipality. It is fortunate for Norfolk that this is so; it would be a subject of serious public regret if it were not so.

International Article 21 was the law of the road on the occasion when the *Plymothian*, off buoy 9, and the

Victory abreast of Craney Island Light, one mile and an eighth apart, began at the same time to approach each other along the narrow channel of Elizabeth River between those two points. The *Plymothian* obeyed Article 21; the *Victory* disregarded it. The collision which happened in direct consequence of the *Victory's* disloyalty to the rule, was caused by the *Victory*, and through her fault alone. The fact that she had had a schooner close under her starboard side shortly before the collision, did not excuse, but condemned her. The fact that this and two other schooners were moving on her starboard on the eastern side of the channel, were three additional reasons why she should have come up on the western side from Craney Island. These three insignificant vessels were teaching her a lesson which she rejected.

International Article 15 did not apply in this case. At a distance of a mile apart, these two steamers, in full sight of the channel between them, by clear daylight, were not approaching each other "in such manner as to involve risk of collision."

The liability of the *Victory* for this collision does not depend upon the question whether the statement of facts drawn up by the Court, and prefixed to this opinion, is strictly and in every respect in conformity with the weight of evidence taken in this cause. If there were no other evidence in the record but that given by the master and crew of the *Victory*, that ship would be shown to be liable. She had no right, seeing the *Plymothian* coming up the narrow channel, to persist in running on the eastern side of it.

The thoroughly disproved testimony given by her master and the deck witnesses of her crew, intended to show that she was driven to the extreme eastern side of the channel by other steamers and by sailing vessels, has no other value in the case than to show that these witnesses felt the pinch of Article 21, and made desperate efforts to excuse the obstinate and fatuous perseverance of her navigators in keeping on the eastern, and to them as they well knew, the contraband side of the channel. The *Victory* is liable for the collision; and I will decree in all respects to that effect.

It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting; and I think both steamers were at fault in not having had each a special lookout on duty. But in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the main bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stem. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine-room would hardly have differed from those actually given, if a lookout had been calling out to them what they both clearly saw and knew.

But it is only with reference to the *Plymothian* that the question of lookout is of any importance. The contention of counsel for the cargo, that the absence of a lookout on that steamer contributed to the collision, is not supported by the evidence in the case. Inasmuch as this evidence shows that the officers on the bridge did not hear the first cross-signals of the *Victory*, this counsel contends that if there had been a lookout forward, and the pilot, Henley, and the master, Mardon, had been notified of this cross-signal, there would have been time for the *Plymothian* by hard starboarding to have passed the *Victory* on her starboard side. But the proof is, that the *Victory* blew her first cross signal of two whistles as far off as half way between buoy 7 and Craney Island Light, or more than a thousand yards from the *Plymothian*, before any stress of circumstances arose to require of her a violation of the rule of navigation, which she was faithfully adhering to. It was not competent for the *Victory*, at that distance, to require from the *Plymothian* a violation of Article 21, unless there was some cause forcing her to do so. That there was no such cause is shown by the evidence, and was virtually confessed by the *Victory* herself when she failed to follow up her cross-signal by additional three sharp alarm whistles giving notice of such a cause. Failing in this, the *Plymothian* was not, at a distance of a thousand yards, and running against a

flood tide at the rate of only four miles, either under obligation or at liberty to disregard a cardinal rule of navigation at the mere cross-signal of the *Victory*. She would not and should not have done so, even if a lookout, properly posted in her bows, had notified her navigators of the cross-signal. Her officers on the bridge would and should have pursued precisely the course, if they had known of the first cross-signal, which they did pursue on not hearing it; and the absence of a lookout contributed naught towards the collision. I, therefore, consider that the contention of the counsel for the cargo on this point must be overruled.

Although it is wholly unnecessary in this decision to do so, I will notice some references of counsel for the *Victory* to the decision of this Court in the case of the *Lawrence — New York*, rendered in August, 1892, and affirmed on appeal by the United States Circuit Court of Appeals for the Fourth Circuit, at its February Term, 1893.

Counsel for the *Victory* contends that in that case this Court held that a steamer coming up in the channel of Elizabeth River from Craney Island to Norfolk was at liberty to take either the western or eastern side of the channel at pleasure. The decision was a very different one, and was rendered in a case having no relation to the question involved in the present litigation. In that case the steamer *New York*, plying twice a day between Norfolk and Cape Charles City, had, in a foggy morning, while moving at an unlawful speed in a fog, run into the barge *Lawrence*, which was a very large vessel loaded with coal, and lying at anchor on the western side of the channel of Elizabeth River, half way between buoy 7 and Craney Island Light. It was shown in evidence that the channel where the *Lawrence* lay was 450 yards wide; that the *Lawrence* was anchored on its western side as near to the bank as could be to allow of her swinging clear of it, and that at least half of the 225 yards west of mid channel was clear. The *Lawrence* was swinging when run into due north on an ebb tide, and was not only on the western side of mid-channel, but was well off on the western side of that 225

yards of western channel? The steamer *New York* came down from Craney Island close upon the western side of the channel in a thick fog and struck the *Lawrence* on her starboard quarter, although there was abundant room between the *Lawrence* and mid-channel for the *New York* to pass to the port or east side of her. Nothing is said in the opinion of the Court to indicate that the *New York*, in passing on the port side of the *Lawrence* would have passed to the east of mid-channel. Between the *Lawrence* and mid-channel there was clear space of more than a hundred yards; and the water east of mid-channel was not in the case at all. The evidence showed that there was not room between the *Lawrence* and the western bank of the channel for the *New York* to pass, and the Court held that the *New York* was in fault in not passing on the eastern side of the barge where there was abundant room. The Court used the following language in its decision:

"All the testimony shows, and the pleadings admit, that they (meaning the *Lawrence* and a companion barge that was lashed to her port side), were then on the western side of the channel. The evidence shows, moreover, that the *New York* struck, from the west, the barge which was the western one of the two. Certainly there was room in a channel, half of it as wide as 225 yards, for a steamer to pass vessels lying in the other half of the channel which was another 225 yards in width."

That case has, therefore, no analogy with the one at bar. Equally erroneous is the contention of counsel for the *Victory*, that in that same case of the *Lawrence-New York*, this Court held that the Elizabeth River, north of buoy 9, was a part of the harbor of Norfolk, and subject to her jurisdiction in respect to a Harbor Master. The facts were, that by a stretch of authority, growing out of a public necessity, Norfolk had appointed a nominal harbor master at Lambert's Point, who assumed and exercised the authority of designating places of anchorage for the great number of vessels constantly coming in there for the Pocahontas coal. This harbor master, so called, had for some time been in the habit of anchoring these vessels

on the western side of the channel near to red buoy 22 and up and down on that side as far as necessity required. He so acted by general sufferance and from public necessity and not by conceded authority. This *quasi* official action of his was known to all the masters of steamers which navigated the channel, all of whom acquiesced in and none of whom resisted his authority. Contrary to this self-adopted rule of acquiescence, the master of the *New York*, in the suit of the *Lawrence*, among other things, contended that the *Lawrence*, when she was struck by the *New York*, was unlawfully where she was, and that she had been illegally anchored there by a person who was not a harbor master in the eye of the law.

This Court held that she had a right to be where she was when she was struck by the *New York*. Its language was as follows:

"In a technical point of view, the authority exercised (by the acting harbor master) is probably questionable. But the public interests required that there should be some authority to control and regulate the anchoring of those loaded vessels; and until the law provides some other means of regulating this important business, custom and general acquiescence must be held competent temporarily to supply the omission of the law. These barges were passive in the matter of being placed in the anchorage in which they lay. They had not gone there of their own volition, in a spirit of caprice and indifference to consequences. The presumption is that, objectionable as the practice is of placing vessels along that channel in such numbers as the evidence shows, yet the placing of these particular barges was as judicious as the evil practice admitted of, and I do not feel that it would be competent or just for this Court to undertake a reform of this evil by imposing penalties. The reform needed is a subject for municipal legislation, and it is hardly admissible for the Court to assume the role of legislation by means of penal decrees and judgments."

There is nothing in this decision that gives countenance to the proposition that the channel of Elizabeth River between Lambert's Point and Craney Island is part of the

harbor of Norfolk, subject to her jurisdiction, and excepted from the operation of Article 21 of the International Rules of Navigation.

As to the question whether the clause contained in the bills of lading of many British ships and sanctioned by British law, exempting the ship from liability for damages to her cargo, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariner or other servants of the shipowner, and some of them containing a clause providing that the contract shall be governed by the laws of the flag of the vessel carrying the goods, it has been settled in this country that such clauses are contrary to public policy and therefore null. I should feel constrained to rule accordingly, if the question could rise in the case at bar.

Opinion of the Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

THE CANTON INSURANCE COMPANY, LIMITED, *et al.*, Appellants, VERSUS Claimants of Steamship "VICTORY" and Claimants of Steamship "PLYMOTHIAN," Appellees, AND Claimants of Steamship "VICTORY," Appellants, VERSUS THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of Steamship "PLYMOTHIAN," Appellees.	Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued February 11, 1895. Decided May , 1895.)

Before FULLER, Chief Justice, and GOFF and SIMONTON, Circuit Judges.

Argued by Mr. WILHELMUS MYNDERSE, of BUTLER, STILLMAN & HUBBARD, for Canton Insurance Company; ROBERT M. HUGHES, of SHARP & HUGHES, for the S. S. *Victory;* FLOYD HUGHES, of WHITEHURST & HUGHES, for S. S. *Plymothian.*

These are appeals from the District Court of the United States for the Eastern District of Virginia, sitting in admiralty.

On the 12th November, 1891, the British steamer *Victory*, in ballast, was proceeding up Elizabeth River on her way from Hampton Roads to Norfolk. The steamship *Plymothian*, on the same day, had left the pier at Lambert's Point and was proceeding to sea down Elizabeth River. She had a cargo of cotton. The *Victory* was an iron steamship, 338 feet in length, 38½ in breadth, drawing 17 feet aft and 13 feet forward. In officers and crew she had thirty-one men. The *Plymothian* was 216 feet long, 1,016 net tonnage, her cargo of 3,682 bales of cotton. Her officers and crew numbered twenty-one. Each ship was in charge of a local pilot. The master of each steamship was on the bridge with the pilot acting as lookout, and seeing that the pilot's orders were executed. Neither of the steamships had any other lookout. The channel from the pier at Lambert's Point runs to the channel of Elizabeth River at an angle of about 45 degrees. At black buoy No. 9 in Elizabeth River, the channel of the river becomes nearly, if not entirely, straight, and runs due north from that buoy on a line to and beyond Craney Island light, the distance between the buoy and the light being one and one-eighth of a mile. The uniform depth of the channel between these two points is 25 feet. At Craney Island the channel is 250 yards in width; at buoy No. 9 the channel is 400 yards in width; outside of the channel on both sides thereof there are large spaces of water, that to the west side being 8 or 10 feet in depth, and on the east side of the channel more shallow.

The *Plymothian*, coming from Lambert's Point, had reached the angle of the channel at buoy No. 9, and straightening out again proceeded to sea under a ported helm, keeping to the starboard side of the channel; this was at 4 P. M. At the same time the *Victory* was seen in the channel of the same river opposite to Craney Island light, a mile and one-eighth off, under a starboard helm; she was about mid channel, or perhaps to the eastward of mid-channel, and moving with the tide about 6 or 7 miles an hour.

The *Plymothian* was steaming against the tide at the rate of 4 miles an hour. They kept their respective courses without change until collision became imminent,

indeed inevitable, when each reversed engines and backed with all speed, but without avail. At 4.14 P. M. the stem of the *Victory* penetrated the port side of the *Plymothian* at her main bridge, inflicting so deep a wound that she had to be beached on the bank of the channel east of buoy No. 7. The owners of each of the steamships instituted proceedings seeking limitation of liability. The *Victory* has been appraised at $67,500. She claims to have sustained injury from the collision to the amount of $14,000. The *Plymothian* has been appraised at $33,000. Her freight is valued at $11,871, in all, $45,000 and upwards. The actual amount reduced by her proportionate amount of salvage expenses is $40,000. She claims damages arising from the collision to the amount of $42,000. The damage to the cargo is proved to be $72,000. Each steamship intervenes in the proceedings of the other and claims damages for the collision. The owners of the cargo intervene in both proceedings, seeking to hold both vessels responsible. The District Court held the *Victory* to be solely in fault, and rendered a decree against her, apportioning the sum for which stipulation was given for her *pro rata* between the *Plymothian* and her cargo. Each party comes up to this Court on appeal.

SIMONTON, Circuit Judge:

The experienced and learned Judge who heard the case below, after a clear and full statement of the facts, held the *Victory* liable for the collision, because she violated the great rule of the road, "keep to the right." He applied to her that rule as embodied in Article 21 in the Revised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by an act of Congress March 3, 1895, 23d Statutes at Large, page 238.

The *Victory* being in a comparatively narrow but deep channel, up which she was proceeding in full view of the *Plymothian* coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the *Plymothian* to respond to her signals, thus making a collision inevitable. Article

21 is in these words: "In narrow channels every steamship shall, when safe and practicable, keep to that side of the fair way or mid channel which lies on the starboard side of such ship." The proctor of the *Victory* contends that this rule does not apply to the navigation of Elizabeth River, as it is not included in the term "upon the high seas or coast waters of the United States." But in the case of the *Britannia*, 153 U. S., page 130, the Supreme Court of the United States held this Rule 21 binding upon vessels in the harbor of New York at the entrance of East River, and in the *John Knox*, 1 C. C. A. Reports, page 323, the Circuit Court of Appeals of the Second Circuit reached the same conclusion, notwithstanding that the Rule 23d of the Navigation Act appeared to be in conflict with the rule of the supervising inspectors in regard to navigation in New York harbor.

The Rules of Navigation in the Act of 1895 control all vessels on the high seas and coast waters of the United States. The cases above quoted evidently construe these words "coast waters" to mean harbors and other waters upon the coast communicating directly with the ocean. We would be led to the same conclusion, comparing the language used in the Act of 19th August, 1890, 26 Statutes at Large, 320. This act has not yet gone into effect, but it is in *pari materia* with the Act of 1895, and is intended to modify and improve it. It also has an Article 25, containing the exact provisions of this Article 21, and it declares that the regulations must be followed by "all public and private vessels of the United States, upon the high seas and in all waters connected therewith, navigable by sea-going vessels." And it also excludes from its provisions the harbors, lakes and inland waters of the United States. It is not unreasonable, therefore, to construe these words harbors, lakes and inland waters of the United States as meaning the Great Lakes and their harbors and inland waters connected therewith, and to such rivers as flow in the interior of the country at long distances from the sea. But whatever construction we may give to these words, if we conclude that the *Victory* in Elizabeth River was governed not by the regulations of the Act of 1895 but by the regulations theretofore in force, embraced in Sec-

tion 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned Judge enforced here, "keep to the right."

Not only so, but these regulations in Rule 21 prescribe that every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary stop and reverse. There can be no doubt that these two vessels were approaching each other, each stubbornly adhering to the same side of the channel, and that their movements involved the risk of collision.

It is contended that the *Victory* in Elizabeth River was under no special regulation requiring her to proceed on that side of the river channel to her right. But if she were not controlled by the regulation of the Act of 1895, or by the regulation set forth in the Revised Statutes, she must have been under some rule established by custom (see *The Vanderbilt*, 6 Wall., 225). The record discloses no custom which authorizes a vessel in this river proceeding down the channel to select either side she pleases.

We are of the opinion that the Court below did not err in the conclusion as to the error committed by the *Victory*. But in considering the right of the owners of the cargo to damages, we cannot reach the same conclusion which he did, exempting the *Plymothian* from all responsibility.

The record shows that the two steamships, at 4 o'clock on a bright afternoon, came into collision in Elizabeth River, a broad and deep stream with ample sea room for each vessel, each having seen the other in full and uninterrupted view when over a mile and an eighth apart. The *Plymothian*, it is true, was on that side of the river where she should be, and the *Victory* was on the wrong side of the channel. Yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision. It is true that the *Victory* committed a very grave error, and her fault is the greater, but this will not excuse the *Plymothian*.

The rules of navigation leave but little room for mere

4696

conjecture in controlling the action of the master and pilot. Each of them has in his power the means of ascertaining with approximate certainty the intention and course of the approaching steamer. He must use them.

"Notwithstanding the error committed by one of the two vessels approaching each other from opposite directions, it did not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent the collision." Rule 24, *Maria Martin*, 12 Wallace, 27; *The Scotia*, 14 Wallace, 181.

"If there be any uncertainty as to the intention of the approaching vessels, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel in reference to her movements. It behooves those in charge to be prompt in availing themselves of every resource to avoid not only collision, but the risk of such a catastrophe." *The Louise*, 3 C. C. A., 330.

As was said by Brett, M. R., *The Beryl*, 9th Prob. Div., 137: "The basis of the regulations for preventing collisions at sea is for their instruction to those in charge of ships as to their conduct, and the Legislature has not thought it enough to say, we have given you rules which will prevent a collision; they have gone further, and said, for the safety of navigation we will give you rules which will prevent risk of collision. It is not enough if you do only that which will prevent collision; we will give you rules which will regulate your conduct for the purpose of preventing even the risk of collision. The words are not, if two ships are crossing with the risk of collision, but are crossing so as to involve risk of collision." *The Eleanor*, 17 Blatch., 88.

We cannot find anything in this record which shows any precaution taken by the *Plymothian* when she saw the *Victory* disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signals. Even that was not done until it became too late to avoid collision. Under these circumstances it is impossible to say that the *Plymothian* is free from fault. It certainly would not be equitable to allow her to go in and share on equal terms

in the fund in this Court with the cargo, which certainly was in no fault whatever.

The rights of the cargo owners differ entirely from those of the two steamships. They in no way shared in the faults committed, and they are entitled to complete indemnity, *restitutio ad integrum*. *The Atlas*, 93 U. S., 302; *The Alabama and Game Cock*, 92 U. S., 695; *The Virginian Ehrman and The Agnese*, 97 U. S., 316.

In this instance before the Court, the cargo must be paid for in full by both vessels. This leads to the embarrassing question, "How shall these damages be apportioned between these two vessels? Each of them, as has been seen, was in fault. But the Judge who heard the case, and with his usual care and ability examined and weighed the testimony, came to the conclusion that the *Victory* was grossly in fault, so much so as to be the sole cause of the disaster. Whilst not going to this length with him, this Court fully concurs in his conclusion, that the *Victory* was grossly in fault. The *Plymothian* was guilty of an act of omission. The course of the *Victory* seems almost willful. The *Victory*, no doubt, was the *prima facie* cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances it would seem to be manifestly inequitable to assess upon her one-half of the entire loss.

The loss to the cargo was	$71,000
The damage to the *Plymothian*	33,000
The damage to the *Victory*	14,000
	$118,000
Of which one-half is	59,000
The value of the *Plymothian* is	40,000

The rule unquestionably is, that when both vessels are in fault both must contribute to make good the damages (*The Washington and the Gregory*, 9 Wall., 513; *The Connecticut*, 103 U. S., 710; *The Potomac*, 105 U. S., 630). And the general rule, almost universal, is to divide the

loss equally among the guilty parties, with this qualification: that if one party is exhausted before the person injured is fully indemnified, the deficiency must be made up by the other party (*The North Star*, 106 *U. S.*, 17; *The Max Morris*, 137 U. S., 1; *The Washington and the Gregory*, 9 Wall., *supra*. *The Alabama and the Game Cock*, 2 Otto., *supra*). But this rule cannot be said to be inflexible. In *The Max Morris*, 137 U. S., 1, the question was suggested before the Supreme Court, but it was not necessary to pass upon it. The Court says: "Whether in a case like this (mutual fault) the decree should be exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion on it.

The application of an equal division of damages is said to be the *rusticum jus*. Chancellor Kent applies to it that term (3 Kent Comm., Section 231; Marsden on Collision, 2d Ed., page 133). That is to say, it is an application of that sense of fair dealing and of justice imbedded in our nature, the conclusions of common sense, of a mind "*abnormis sapiens*." If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency, so that the cargo owners obtain complete indemnity.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 755 [illegible] 67

JOHN MACINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MACINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No.

JOHN MACINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MACINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

To the Honorable Supreme Court of the United States:

The petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann

Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Leitch, and the British Steamship Investment Trust, Limited, respectfully shows to this honorable Court as follows:

The petitioners are owners of the British steamship *Victory*, which on her way into Norfolk about 4.15 p. m. November 12, 1891, collided with the British steamship *Plymothian*. The *Victory* was coming in light on a flood tide. The *Plymothian* had just finished coaling at Lambert's point and was starting to sea. The collision occurred near buoy No. 7, between Craney Island light-house and Lambert's Point pier. The vessels came together with the bow of the *Victory* against the port side of the *Plymothian*. The result was that the *Plymothian* sank and that a large hole was made in the starboard bow of the *Victory*, entering at the starboard side and almost going through the port side, causing the plates on the port side to bulge outwards, but, the *Victory* being light, the injury was above the water line. The *Plymothian* was loaded with cotton, which was damaged by water. The *Victory* was damaged to the extent of over $14,000 and the *Plymothian* to the extent of over $41,000, the cargo of the *Plymothian* being damaged about $72,000.

The petitioners promptly libeled the *Plymothian* and the owners of the cargo of the *Plymothian* libeled both the *Victory* and *Plymothian*. These libels, however, were merged into the limited liability proceeding that each vessel took immediately thereafter.

The claim of the *Victory* as to the facts of the collision is that she weighed anchor in Hampton Roads at 3.30 and started to Norfolk; that she met several steamers which gave her two whistles, which she accepted, thus placing her on the eastern side of the channel; that south of Craney island there were three schooners going down the river, forcing her to remain on the eastern side (as crossing to the other side would have involved crossing their bows and unnecessary danger); that the eastern side was clear and that

she came up, having reduced her speed just before reaching Craney island; that just after passing Craney Island lighthouse she saw a steamer on the western side of the river near the Merrimac buoy; that at this time the vessel was three or four points on her starboard bow; that she gave this steamer two whistles, the vessels being then some distance apart; that the steamer answered so that the master of the *Victory* saw two puffs of steam, but only managed to hear one whistle on account of its imperfections; that, to make things more certain, the *Victory* repeated her signal of two whistles, but the other vessel commenced to show by her movement that instead of keeping down the western side of the channel she was porting, thus crossing to the eastern side of the channel and throwing herself across the bows of the *Victory;* that as soon as those on board of the *Victory* observed this porting they reversed and gave danger signals; that they were not able to port themselves on account of a schooner which was on the *Victory's* starboard bow, and which would have been run over; that the other vessel continued to come ahead; that at the time of the collision the *Victory* had about killed her headway in the water (though it is possible that with a flood tide she had not killed her way over the ground); that the *Plymothian* ran across the *Victory's* bows, driving a piece of her plates through from starboard to port, and that the nature of the injury to the *Plymothian* was such that she was beached and sunk.

The contention of the *Plymothian* is exactly the opposite. They insist that they came out from the pier at Lambert's point and hugged the eastern line of the channel. They insist that they gave the first whistles, being a single signal repeated twice, and that the *Victory* crossed the signal by giving two whistles. They insist the *Victory* was not on the eastern side of the river coming in. They insist that she was proceeding too rapidly, and that she did not back until just before the collision, and they also insist that

they did back, and had some sternway at the time of the collision.

The district court decided that the *Victory* was solely to blame for the collision. It based its opinion upon the position that the International Rules of 1885, and not the rules of navigation laid down in section 4233 of the Revised Statutes and the supervising inspector's regulations, governed in the waters where the collision took place; that the *Victory* violated article 21 of the International Rules, requiring steamers in narrow channels to keep on the starboard side (a rule not found in the Revised Statutes or the supervising inspector's regulations), and that this was the proximate cause of the collision.

The court, in reaching this decision, expressly held that the port-helm rule (No. 15 International, No. 16 Federal) did not apply, as the vessels were not meeting in such direction as to involve risk of collision, nor did it blame the *Victory* on the score of signals or speed.

It found no fault with the *Plymothian* at all, although even according to the evidence of the *Plymothian* it had given its first signal to the *Victory* when they were a mile and an eighth apart, and did not reverse until, according to their testimony, the *Victory* had crossed signals with them and gotten within two or three hundred yards (Mardon, R., 265), and although the photographs show that at the time of collision the *Plymothian* was moving faster than the *Victory*. Nor did it find fault with the *Plymothian* for her imperfect lookout, although their own testimony showed that her navigators did not hear the first signal of the *Victory*, and did not see a schooner that was in front of them in plain sight.

From this decision the owners of the *Victory* appealed to the circuit court of appeals at Richmond, and the owners of the cargo of the *Plymothian* also appealed, because the *Victory* alone was held in fault and they were deprived thereby of all remedy against the *Plymothian*.

The circuit court of appeals held that the *Victory* was in fault for not taking the western side of the channel; held also that the International Rules governed these waters, and that she therefore violated article 21 of these rules; and went still further, and held the remarkable proposition that the Federal rules embodied in section 4233 contained a similar rule requiring vessels to keep to the starboard side of the channel or, as the court expresses it, to keep to the right. It does not cite this supposed rule from section 4233, but the petitioners presume that it has confused the port-helm rule with article 21 of the International Rules and held them synonymous, though no greater mistake could possibly be made, the district court having rightly held that the port-helm rule did not apply, as the vessels were not moving in such direction as to involve risk of collision. The circuit court of appeals, however, reversed the decision of the lower court as to the *Plymothian*, and held that the *Plymothian* was also in fault. The context of the opinion would rather indicate that the fault which they ascribe to the *Plymothian* was her failure to back in time. They speak of this as a very venial fault, "an act of omission," and they characterize the action of the *Victory* in not keeping on the starboard side by some very emphatic adjectives.

Accordingly they held both were in fault, but thought the fault of the *Victory* the greater, and they required the *Victory* to pay her entire bond, amounting to $67,500, and the *Plymothian* to simply make up the deficiency to the cargo-owners, a deficiency which, including interest, aggregated about $20,000, and they laid down the novel doctrine that a court in its discretion has power, if it thinks one vessel more in fault than another, to divide the damages between them unequally, and not to follow the rule of half damages, which they admit to be almost universal.

The petitioners appeal to this Court to review that decision, as it contains two questions, not simply of national, but

of international importance, namely, what waters are controlled by the International Rules, and what is the proper rule for dividing the damages where both vessels are in fault, even though the fault of one may exceed that of the other.

Many questions were discussed during the progress of this long litigation which have lost their importance, in view of the ground taken by the district court and the court of appeals in their opinions. As they are mainly questions of fact, it would serve no useful purpose to go into them elaborately, and therefore they will be reviewed as briefly as possible for the mere purpose of placing the Court in possession of the history of this litigation.

The first of these questions was whether, assuming for the moment the truth of the facts as claimed by the *Victory*, she was right in starboarding her helm.

DID THE PORT-HELM RULE APPLY?

According to our contention, when the *Plymothian* came out from Lambert's pier and swung around into the channel, the tide being flood and therefore sweeping her up the river, she necessarily went over, not of course to the western edge, but into the western half of the channel—that is, west of mid-channel—and in this position was three or four points on the *Victory's* starboard bow, at which time the *Victory* gave her two signals. It was contended in the lower court that even on this state of facts, if true, they were meeting end on, and the *Victory* should have given her one whistle and applied the port-helm rule.

That rule is in the following language:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other."

This rule has been frequently before the courts, and the conclusion has been that vessels are not meeting end on unless they are in such position that, if at night, each would see both colored lights of the other. As long as they are moving on courses which, if at night, would expose green to green or red to red, it is not a case where the rule applies.

This understanding of the law is universal among courts and seamen, and is well expressed in the old couplet:

> "Green to green, or red to red,
> Perfect safety, go ahead."

When vessels are moving on courses so they will clear each other if each holds its course, the law does not require them to swing around and each cross the other's path for the mere sake of a port helm.

Marsden, in his admirable work on collisions, says that the indiscriminate application of the port-helm rule has been a fruitful source of collision (p. 422).

When vessels are meeting each other dead ahead or slightly on each other's port bow, then the rule undoubtedly is that each must port; but when each is on the other's starboard bow as much as a point or more, then, as there is no risk of collision while that position is maintained, the rules of the road not only justify, but require that they shall pass each other starboard to starboard.

This is carried out in the navigation of our local waters by rule 1 of the Pilot Rules for Lakes and Seaboard, prescribed by the supervising inspectors.

That rule is in the following language:

"When steamers are approaching each other head and head, or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other, and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall

pass to the right, or port side, of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting head and head, or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left or starboard side of each other.

"NOTE.—In the night steamers will be considered as meeting head and head so long as both the colored lights of each are in view of the other."

In the case of the *Manitoba* (2 Flip., 241), Brown, district judge, held that this port-helm rule only applied when, if it was a case at night, each vessel would see both of the lights of the other. It was a case where the divergence was only three-fourths of a point, each being that much on the other's starboard bow, and the court held that starboarding was the proper course. This decision was affirmed both by the circuit court and by the Supreme Court.

The Manitoba, 122 U. S., 97.

The testimony of the crew of the *Victory* that they were forced to the eastern side by passing vessels was much attacked, and witnesses from two or three steamers that went down that evening were produced by the *Plymothian* to show that they had passed the *Victory* port to port. It is not a sufficient impeachment of a witness to show that in a harbor of the importance of Norfolk some steamers passed differently from his contention. The fact that the *Luray* and *Virginia Dare* passed port to port does not show that the *Louise* and *Accomac*, which were the steamers named by the *Victory's* witnesses, did not pass port to port.

DID THE VICTORY BACK SEASONABLY?

The *Victory* was also attacked on the ground that she did not stop and reverse in season. The proof on the side of the *Victory* as to this is that she gave a single signal;

that she saw a response, but could not make it out on account of its indistinctness; that she thereupon repeated her signal, and that she reversed as soon as she saw indications in the opposing vessel of swinging across her path.

The language of the backing rule is as follows:

"Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed or, if necessary, stop and reverse."

According to the testimony of the *Victory*, confirmed by some of the witnesses for the *Plymothian*, she had already slowed down. She did not, therefore, have to stop and reverse, under the very letter of the rule, until it was necessary, and it was not necessary until this eccentric movement of the *Plymothian* was developed. At that time it was too late, as far as the *Victory* was concerned, for she was coming in with a flood tide of two knots, and therefore took a much longer time to kill her headway than the *Plymothian*, which had just started and had the tide against her. This fact made the *Victory* the favored vessel.

The Galatea, 92 U. S., 439.
The Diana (1894), A. C., 629.

WHISTLES.

The question of whistles was the one most vigorously contested in the lower court, and as to which the evidence is hopelessly in conflict.

The contention of the *Victory* is that she gave the first signal of two whistles, and that the *Plymothian* crossed her signal. The contention of the *Plymothian* is that she gave the first signal of one whistle, and that the *Victory* crossed her signal.

The contention of the *Victory* was confirmed by disinterested testimony from the steamer *Princess*, which was anchored near the collision spot, that testimony being taken

only two days after the collision, and by disinterested testimony from the barge *Storm King*, which was taken about a year after the collision. On the other hand, a very great number of witnesses were produced by the *Plymothian* at the trial three years afterwards to show that she gave the first signals. Their testimony, however, is as much in conflict with the crew of the *Plymothian* as it is with the crew of the *Victory*. The *Plymothian* claims to have given her first signal when she was about off buoy 9, at Lambert's point, and the *Victory* about off Craney Island light. At this time the vessels were a mile and an eighth apart, and the testimony of both sides is to the effect that the whistles of English steamers are inferior. The usual signaling distance, as is well known, is about a half a mile, so that it would not be an unpardonable crime if the navigators of the *Victory* did not hear this first signal.

The navigators of the *Plymothian* claim that they gave one signal, then another, then another, and finally the danger signal, and that the *Victory* answered only their third signal. The testimony of their disinterested witnesses is that they only gave two single signals to the *Victory*, and that the *Victory* answered the first, and the testimony of the navigators to the effect that they gave three single signals is contradicted by some of their own crew. Lyons, their helmsman, only heard two; Ham, one of the crew, only heard two, and Shroeder, another of their crew, only heard two. In addition, the proof shows that many salute whistles were given, that there were many tugs blowing around Lambert's point, and it was a venial fault in the crew of the *Victory* not to have heard all these whistles, which disinterested witnesses immediately around the *Plymothian* and not a mile and an eighth distant, like the *Victory*, positively swear were not given.

Neither the district nor appellate court, however, found any fault with the *Victory* on the score of her whistles.

COMPARATIVE SPEED.

Another question much discussed in the lower court was the speed of the two vessels. The witnesses for the *Plymothian* did not hesitate to make the wildest statements as to the speed of the *Victory*, some of them putting it as high as ten or twelve miles an hour.

Careful measurements will show that from Craney island to buoy 7 the distance is 1,150 yards, and from buoy 9 to buoy 7 is 750 yards. The district court in its opinion states that from Craney island up to buoy 7 is 1,200 yards, and to buoy 9 is 1,967 yards, and that the distance between the two buoys is 735 yards. This is a patent mistake, for if it is 1,967 yards from Craney island to buoy 9 and 1,200 from Craney island to buoy 7 it is bound to be 767 from buoy 7 to buoy 9. In the rough, then, we may say that the distance from buoy 7 to Craney island is one and one-half times that from buoy 9 to buoy 7. The testimony of the *Plymothian* navigators places the *Victory* off Craney island and themselves off buoy 9 when the first signals were exchanged; hence, according to their own testimony, the *Victory* moved 1,200 yards while they moved, say, 800 yards—that is, she was moving one and one-half times as fast only; but the *Victory* had behind her a current of two miles an hour, and the *Plymothian* had against her a current of the same amount. Disregarding the current entirely, if the *Plymothian* was moving at the rate of four and a half miles an hour the *Victory* was only moving at the rate of seven miles an hour, and when we take the current into account the *Plymothian* appears to have been moving through the water faster than the *Victory*.

THE VICTORY'S COURSE.

The question of the *Victory's* course was also much discussed in the lower court. The pleadings of the *Plymothian* themselves only claim that the *Victory* was in mid-channel, so that the testimony of some of their witnesses, that she was west of mid-channel, is as preposterous as their statements of her speed.

THE PLYMOTHIAN'S COURSE.

The question as to the *Plymothian's* course was also much confused. She claims that she went out from Lambert's pier, turned sharp around buoy 9, passing it within a few yards only, and kept straight down the edge of the eastern side of the channel, moving under a port helm all the time. The *Victory* claims that in coming out from the pier into the channel she necessarily went out partially across the channel. As she was 260 feet long and the tide was flood—that is, on her starboard bow—common sense would seem to sustain this claim. If a ship 260 feet long can turn sharp around a buoy as a buggy turns sharp around a street corner, she must have a fifth wheel in her like a buggy. Such vessels have not as yet been invented. Some of their own witnesses place her much further out than the eastern edge of the channel, which her navigators claim she always held. For instance, J. I. Clark, disinterested, testifies that she went out "not quite to mid-channel" (R., 389). Brown from Craney Island light saw her "about the middle of the channel" (R., 346). Ham, one of her own crew, says that in going out they headed straight across the river (R., 189). Lyons, another, speaks of receiving a certain order "when we got out in the middle a way" (R., 209). Her testimony that she hugged the eastern bank is necessarily impossible. According to these measurements, it is about 800

yards from buoy 9 to buoy 7. They claim that after they passed buoy 9 their helm was slightly a-port until shortly before the collision, when it was put hard-a-port. How did she move within 40 to 60 yards of the bank a distance of 800 yards without running aground?

These questions, however, are immaterial in view of the opinions, though the petitioners feel bound to allude to them, as they can concede nothing by silence. The important questions in the case are those which were emphasized in the opinion of the courts, namely, whether the International Rules govern the navigation of these waters, and thereby made the *Victory* so emphatically in fault as the appellate court seems to think, and whether, even if she was guilty of greater fault than the *Plymothian*, the court had any power to divide the damages according to mere caprice and not follow the rule of half damages.

The importance of the question whether these waters are controlled by the International Rules of 1885, instead of the Federal statutes and Supervising Inspector's Rules, arises from the fact that the International Rules of 1885 contain an article (No. 21) in the following language:

"In narrow channels every steamship shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such ship."

This rule, despite the assertion of the court of appeals, has no counterpart in section 4233 or the Supervising Inspector's Rules, and yet the violation of this rule is the main fault which the court has found against the *Victory*. If, therefore, the International Rules do not apply to these waters, but the Supervising Inspector's Rules, the action of the *Victory* in the collision in taking the eastern side is vindicated, for, as is well stated in the last edition of *Marsden on Collision, page 465*—

"Questions may arise as to the application of the starboard-side rule or article 21 in waters where (as, for example, the River Thames) local rules of navigation are in force; but where there is no rule as to the side of the channel upon which ships are to navigate, it is submitted that in such case article 21 has no application, and that absence in the local rules of a rule requiring vessels to navigate on one side of the channel or the other leads to the inference that vessels are free to navigate in any part of the channel."

Hence, if those waters are governed by the Federal statutes and the Supervising Inspector's Rules, all parts of that channel were free to the *Victory*.

DO THE INTERNATIONAL OR FEDERAL RULES APPLY?

In deciding whether the rules of 1885 apply in certain waters of the United States we must look, not to the language of the rules themselves, but to the language of the enacting clause of the statute adopting them. The fact that they have rules for narrow channels or even for harbors is no indication that Congress intended them to apply unless the enacting clause shows such to have been the intention. They must have such rules, for they apply in the harbors of barbarous countries which have no rules of their own; they apply in the narrow channels of archipelagoes, which are not local waters; they apply in straits not under the dominion of any one power, and hence the fact that such rules are contained in the International Rules is no proof that Congress intended them to apply unless Congress has shown its intention that they should. The enacting clause will show that Congress expressly excluded them from applying in local waters, for it says that they shall apply "upon the high seas and in all coast waters of the United States except such as are otherwise provided for." This means except such other waters as are otherwise provided for. The waters otherwise provided for are made

sufficiently plain by the repealing clause of the statute, which says:

"All inconsistent laws are hereby repealed except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States."

Therefore the harbors, lakes, and inland waters of the United States are otherwise provided for, namely, by section 4233 of the Revised Statutes and by the Supervising Inspector's Rules, and therefore the International Rules do not apply upon them.

Yet in the face of this language, so clear that he who runs may read, the district court held (R., 453) that all tide waters navigable from the ocean with navigable depth for ocean craft are coast waters in the meaning of article 21.

It ought not to be hard to find out what is meant by coast waters. Burrill's Law Dictionary defines the coast as "the edge or margin of land next to the sea, the seashore," and the *Garden City case, 26 F. R., 775*, much relied upon by our opponents, defines coast waters as embracing "not merely waters that face the open sea, but bays, passages, inlets, and sounds formed by the islands that skirt the coast." It will require a remarkable geographer to bring the Elizabeth river within this definition. How a body of water thirty miles from the ocean, divided therefrom by a body of land twenty miles square out of sight of the ocean and connecting with it by a narrow channel commanded even by the antiquated guns of Fort Monroe, can be called coast waters passes the comprehension. Not only that, but the locality of this collision was really in a harbor.

Section 2010 of the Code of Virginia, as amended by Acts of Assembly, 1889–'90 (private), p. 623, taken from the chapter of the code establishing a board of harbor commissioners for Norfolk, Portsmouth, and Norfolk county, provides—

"The jurisdiction of said board for the purposes of this chapter shall extend to the Elizabeth river and all branches

and tributaries thereof along the water front of the cities of Norfolk and Portsmouth and Norfolk county."

In the *New York-Lawrence Collision case, 54 F. R., 542,* the right of a harbor master to anchor vessels along this spot was sustained first by the district court (decision unreported) and then by the circuit court of appeals; and yet waters within the jurisdiction of a harbor master are not harbors! A harbor is a place where vessels are accustomed to resort and moor, a safe station for ships, a place of refuge, shelter, rest, and the proof in this case is that many vessels were anchored along in this vicinity waiting their turn at a coal pier, and yet that is not a harbor!

The district judge seemed to think that some terrible consequences to commerce might happen if a vessel starting on a foreign voyage had to change from the International Rules to the Federal Rules and refuses "to dwarf the river into a local harbor subject to the provincial domination of a town council and the crude regulations of ever-changing town officials." The place of this collision was not within the harbor limits of the city of Norfolk, was not subject to the regulations of any town officials or town councils, but was under the jurisdiction of the board of harbor commissioners, a State board created for the purpose of protecting the harbor and prescribing rules for its governance. The "town council" which enacted the Federal Rules was Congress, a body designated by the judge in a late silver article as itself an international board.

This court has frequently sustained even State laws applying to local waters like harbor commissioners' rules, quarantine rules, and pilot rules, and the district court itself has found vessels in fault in this very harbor for violating rules of this very board as to speed, and for twenty years has been applying in the navigation of these waters section 4233 and the Supervising Inspector's Rules.

Nor is there anything in the contention that foreign ves-

sels are subjected to inconvenience in changing from International to Federal Rules on reaching the waters of the United States. There is not a port of any size in any enlightened country which has not special rules for its navigation. The most important are collected in the appendix of Marsden on Collision. The Rivers Thames, Mersey, Scheldt, Clyde, and many others have them. Apparently this fact has not dwarfed the growth of London, Liverpool, or Glasgow as compared to Norfolk. When vessels come into local waters they are supposed to take local pilots. The vessels in this case were both in charge of local pilots who are presumed to know the Federal Rules; hence there is no hardship in bringing them under the purview of these rules.

As was well said by Chief Justice Waite in the *Sarmatian*, *5 Hughes, 158–'9:*

"It is next insisted that as the *Sarmatian* was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover, notwithstanding she exhibited hers so late. The two vessels were on American waters and not on the high seas; they were in the Chesapeake bay, and *infra fauces terræ*. A vast majority of the commerce carried on there was coastwise and local. The *Sarmatian* was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by Congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground simply because the vessel it meets is sailing under a foreign flag. Pilots are employed, not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be

presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly."

The fact that the International Rules of 1885 are not intended to apply is shown by their very language. Those rules, for instance, although they prescribe a full set of lights for sea-going vessels, prescribe none for river steamers. It is the Federal statutes and the Supervising Inspector's Rules which prescribe lights for river steamers. Those lights for such steamers are not only the colored lights, but the two range lights, consisting of a bright light on the stem and a bright light on the flagstaff aft, whereas the International Rules prescribe only the lights carried by sea-going vessels, namely, the two colored lights and the bright masthead light. Hence, if the International Rules governed and not the Federal Rules and Supervising Inspector's Regulations, every river steamer that runs out of this harbor is improperly rigged and has been for years, and this very district court in the case of the *Conoho, 24 F. R., 758*, held a steamer in fault for not being rigged with these range lights.

It is settled law that the soil of these waters and of Chesapeake bay belong to the State and their shell-fish and oysters to the citizens of the State, and yet we are told that they are coast waters!

In the *Cotton Plant, 10 Wall., 377*, this Court held that the waters of the Roanoke river above Plymouth were included in the term "inland waters," and repudiated the idea on which the district court based its decision that they were coast waters because they were navigable from the ocean.

The circuit court of appeals in its decision (also holding that the International Rules governed) first cites as authority the *Britannia case, 153 U. S., 130*, and says this Court held

this rule 21 binding upon vessels in the harbor of New York. The most casual examination of this case shows that this Court held nothing of the sort; that the rules of 1885 were not once alluded to in the opinion, and that the quotations were entirely from the rules contained in section 4233. The court is equally unfortunate in its reference to what it terms the *John Knox case*, *1 C. C. A.*, p. 323, where it says that the circuit court of appeals for the second circuit reached the same conclusion. The reference is meant for the *John King case*, and the circuit court of appeals for the second circuit reached no such conclusion. The International Rules were not once alluded to, and section 4233 was the only one which was quoted from.

And in the *Lisbonense*, *53 F. R., 297*, this same circuit court of appeals for the second circuit, which is represented as applying the International Rules, calls attention to the fact that the International Rules apply below the Narrows and the Federal Rules above the Narrows of New York harbor, and calls attention to various differences between them.

As for the position of this Court on the subject, it not only did not apply the International Rules in the *Britannia case*, but in the subsequent case of the *Breakwater*, *155 U. S., 252*, it applied section 4233 and not the International Rules, and in the very recent case of the *Oregon*, *158 U. S., at p. 204–5*, it intimates (without positively deciding) that the International Rules did not apply in waters such as those; so that no utterance of this Court or of the circuit court of appeals for the second circuit sustains the position of the court on this point.

After thus misquoting these two courts the circuit court of appeals goes on to hold that this phrase in the repealing clause, excepting harbors, lakes, and inland waters, meant the Great Lakes and their harbors and inland waters connected therewith and the inland waters at long distances from the sea. If this was the construction the word "lakes"

alone would have accomplished the purpose, and it is hard to see why the words "harbors" and "inland waters" were inserted.

It would be impossible to apply this starboard-hand rule in harbors. To require vessels going into harbors and approaching vessels at anchor to keep an unswerving course to the right is to ensure collision. Hence, the *Victory* was not at fault in the matter which has been made by both courts the pivotal charge against her.

This brings us to the discussion of the faults of the *Plymothian*. If the testimony of the *Victory* is to be believed as against her testimony, then she was the one that crossed signals and she was much the greater in fault; but for the purposes of this discussion on the question of damages we will take her own testimony, and by that two acts of negligence are clearly proved against her.

THE PLYMOTHIAN'S IMPERFECT LOOKOUT.

In the first place, her own testimony shows that she was not keeping a proper lookout. According to that testimony, her navigators did not hear the signals of the *Victory*, which her disinterested witnesses testified were given, and did not see a schooner until after the collision, which the overwhelming preponderance of testimony proved to be there. They confess to not seeing a schooner which many others saw, to not hearing what many other disinterested witnesses all around them heard, and therefore they were at fault.

The district court held that, though their lookout was imperfect, it did not contribute to the collision. It bases this on the ground that the *Victory* had no right to order the *Plymothian* to take a different course, and that therefore the *Plymothian* had no right to change her course, and that therefore, even if they had heard this first signal of the *Vic-*

tory, they would not have been justified in changing their course, and therefore their inattention was immaterial.

This position, put in plain English, is about equivalent to holding that if one vessel is in fault the other vessel not only has the right, but is in duty bound, to run her down.

It assumes that the only thing which the *Plymothian* could or should have done, in case her lookout had been more attentive, was to change her course, but this view of the district court ignores entirely the very important consideration that if she heard this first cross-signal she could have stopped and backed more promptly.

And this brings us to the other and still more serious charge against the *Plymothian*, to wit, her failure to reverse until too late.

THE PLYMOTHIAN'S TARDY REVERSING.

The crew of the *Plymothian* contend in this case that their engines had been reversed for four minutes at the time of the collision.

If they had given this statement as a mere matter of judgment we might excuse them on the ground of the well-known unreliability of such estimates, but they have laid themselves open to a more serious charge.

We charge that in order to make a case on this point they have deliberately doctored their engineer's log.

The testimony shows that this log, as is the practice, was written up on the evening of that date—that is, after the collision had occurred. It was the more incumbent upon them to write it up naturally and truthfully, but their writing up of what happened in the morning and what happened in the afternoon is on two entirely different theories. Their witnesses testify that it is usual when orders come fast together, so that all cannot be taken down, to simply say in their log "engines working to order." Accordingly we find in this log that in coming into the harbor that

morning they simply say "worked engines to order into coaling berth." On the other hand, in going out they say: "Stand by to order 4 p. m.; full speed 4.05 p. m.; full speed astern 4.10 p. m.:" ship struck 4.14 p. m.; full speed ahead 4.15 p. m., and yet their own witnesses admit that their log does not show all the orders that were given (R., 168–'9). This at once shows that their log was fabricated. If they attempted to write anything they ought to have written everything. It is unreasonable to suppose that at a moment like that, when, as one of their witnesses says, there was danger that the men in the engine-room might be killed, they should stop to note the exact time, and yet only noted the exact time of two or three things.

It is incredible for another reason. According to this testimony, the engines of the *Plymothian* were moving backwards four minutes before the collision, and yet their pleadings only claim that at the time of the collision the headway of the *Plymothian* was entirely checked, and the *Victory's* injuries show that she was moving ahead. She had a two-knot current against her, which would enable her to stop with much more ease, and yet they contend that, though they had barely gotten up steerage-way, according to some of their witnesses, having proceeded such a short distance that they had not gotten up full speed, and though they had the tide against them, they had reversed their engines for four minutes without being able to stop their ship. This, too, is absolutely preposterous. If they could not stop her in four minutes with the tide against her, then, indeed, she must have been proceeding at a rate compared to which the greyhounds of the Atlantic are nothing. This log is suspicious and incredible.

If anybody knows how quickly a steamer can be stopped, it ought to be her engineer.

Pearse, one of the engineers of the *Plymothian*, testifies (R., 182–'3):

"Q. You have stated that when that vessel is under way, full speed ahead, and orders for the engines to go full speed astern are given, that it takes some time to overcome the movement ahead before she moves backwards through the water, and you estimate that time at about a minute?

"A. *About one minute. One minute would be the outside.*"

* * * "Q. How soon will she go astern? Does that depend upon how much headway she has?

"A. Yes, sir; if she has full speed ahead it will take longer to go astern, but she will only take about a minute."

Independent of the testimony of her engineer, any one with any experience knows that it does not take four minutes to start a ship backwards in the water even from full speed. A boat that is as unwieldly as that should be condemned as a public nuisance.

Hence, this entry in the log of the *Plymothian* is false, and deliberately false. It is worse than a crime—it is a blunder. We have the right, therefore, to reject the testimony of the *Plymothian* entirely on the subject of her reversing. Moving as slowly as she was, with a head tide, she ought to have been stopped and could have been stopped, according to the testimony of her own engineer, in less than a minute, and therefore she could not have been reversed as long as four minutes. Hence, she did not reverse until just before the collision. She has a heavier burden in this respect than the *Victory*, because she had the tide to help her manœuvre and the *Victory* had the tide to oppose her.

The testimony of the *Plymothian's* crew, when they are not asked the direct question how many minutes they were reversing, shows that they reversed but a very short time before the collision. For instance, Schroder testifies that he first saw the *Victory* over his starboard bow (not his port); that the *Victory* was then "no ways off" (R., 205), and this was before any reversing at all.

Lyons says that he cannot tell how long they were reversed, but it was a little while. (R., 210.)

Wood is specially emphatic. It is to be remembered that according to the testimony of the navigators of the *Plymothian* the third whistle and the order to reverse were coincident, so that they claim that it was four minutes from the third whistle till the collision. Wood, however, says that the interval between the danger signal and collision was about the same as the interval between the other signals, which he had previously estimated at 20 to 30 seconds, and that at the time the two vessels were only 150 feet apart, so that Wood shows that the *Plymothian* did not reverse until 20 or 30 seconds before the collision and at a time when the vessels were only 150 feet apart.

And even Mardon, the master, who testifies that the danger signals, reversing, and hard-porting were coincident, says that at the time of his hard-porting the *Victory* was only from 200 to 300 yards off. He also says, contrary to the great mass of evidence, that at that time the *Victory* was coming up full speed. Hence, according to his own testimony, he did not reverse until he was within 300 yards of the collision, though his first signal had been given 1⅛ miles off and was unanswered.

The *Plymothian* certainly moved part of this 300 yards before the collision. He does not contend that when he reversed his engines she stopped in her tracks. But let us assume, for the sake of illustrating this point, that the *Plymothian*, the very second she reversed, immediately became still, or, in the language of his answer, that her headway was then entirely checked. If the *Victory* was moving at full speed at a point only 300 yards off, with a strong tide behind her, her full speed being 10 miles an hour, it would take her less than a minute to move 300 yards. If she was not at full speed, but moving at half speed or 5 knots an hour, it would take her less than two minutes to move 300 yards; hence, on Mardon's own statement, even assuming that the *Plymothian* moved not at all, his engines were reversed for less than two minutes before the collision, and yet

his log is brought into court with an entry purporting to have been made by the clock, which is a physical impossibility and a patent imposture.

The very photograph which was offered to show the injuries of the *Plymothian* proves that at the time she was going forward, for an inspection of it will show that its front edge is perfectly smooth, whereas its back edge is rolled and curled back. If she had been stationary the cut on the two sides would have been exactly similar; if she had been moving backward the front edge would show a roll. The fact that the back edge is rolled back shows that she had at least some motion across the bows of the *Victory*, and the further fact shown by our testimony and photographs that there was a hole in the starboard bow of the *Victory*, and a piece of iron had gone through that and lodged up against the other side, pressing it out, although the stem itself was not broken, shows this still more conclusively.

It is difficult to see why, in view of this act of the *Plymothian*, the circuit court of appeals should have considered the fault of the *Victory* the gravest and that of the *Plymothian* slight. The main fault found against the *Victory* was her taking the wrong side of the channel, and that this was not such a culpable one sufficiently appears by the opinion of the district judge, wherein he says:

"East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however, and, owing to the eastward bend of the channel around buoy 9 to Lambert's Point pier, navigators coming up from Craney island are apt to head directly for Lambert's Point light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel." (R., 448–'9.)

The circuit court of appeals speaks of the negligence of the *Plymothian* as merely "an act of omission."

The line between acts of omission and commission is sometimes hard to draw and depends very much on the way you look at it. If a driver sees a child in a public road in ample time to stop and deliberately and wilfully runs over it, he is in one sense guilty only of an act of omission, but it is a novel doctrine to hold that on this account his fault is a slight one. But however this may be and however negligent the *Victory* may have been and however venial the negligence of the *Plymothian* may have been, the petitioners submit that the act of the circuit court of appeals in dividing the damages otherwise than equally is unsustained by authority and as dangerous as it is novel.

THE HALF-DAMAGE RULE.

The opinion cites but one authority to sustain its right to divide damages according to caprice, and that is the case of the *Max Morris, 137 U. S., 1.* The reference to this case is as inapposite as the reference to the *Britannia* and *John King* cases. There is not a line in the *Max Morris* case which holds or intimates that an admiralty court has any discretion as to dividing the damages in collision cases otherwise than equally where both are in fault. That was a personal-injury case, and the real question involved was whether, in case of a libel for personal injury, the collision rule of half damages applied or the common-law rule of contributory negligence allowing no damages. The court, in deciding that in such cases it could make a small award, expressly did so on the ground that it was not a collision case, and the opinion throughout assumes that in collision cases the rule is otherwise.

It is otherwise both in England and America. In the case of *The Catharine, 17 How., at p. 177,* this Court says:

"Upon this view of the case it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

"The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. (9 Law Rep., 30.)

"This seems now to be the well-settled rule in the English admiralty. (Petersfield *vs.* The Judith, Abbot on Sh., 231, 232; The Celt, 3 Hagg., 328, n.; The Washington, 5 Jurist, 1067; The Fiends, 4 E. F. Moore Rep., 314, 322; The Seringapatam, 5 Notes of Cases, 61, 66; Vaux *vs.* Salvador, 4 Ad. and Ell., 431; The Monarch, 1 Wm. Rob., 21; The De Cock, 5 Monthly Law Mag., 303; The Oratava, 5 *ib.*, 45, 362.)

"Under the circumstances usually attending these disasters we think the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides in the navigation."

The English law is well expressed in the case of *Devaux vs. Salvador, 4 Ad. and Ell. (31 E. C. L.), 420,* where Lord Denman said:

"But the collision causes the ship insured to do some damage to the other vessel; and whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two."

See also *Abbot on Shipping, 230–'1.*

These decisions have been followed in numberless cases both in England and America. It is difficult to gather from them any support for the doctrine that damages can be divided otherwise than equally.

Novel as this doctrine is on authority, its dangers exceed its novelty. It is perilous to leave anything to discretion. The more definite the law, the more clearly the rights of parties are defined, the more intelligently can they be advised as to their rights, the more certainly can the result of

litigation be ascertained and the amount of litigation diminished. To allow any one of the nine circuit courts of appeal or the sixty district judges such latitude as to the proportions in which damages should be divided is to put the profession completely at sea. Certainty disappears and litigation increases. The caprice of the individual judge is substituted for the definite rules of precedent, and the remark of the old satirist that equity might as well be measured by the chancellor's foot as by the chancellor's conscience will obtain modern significance. Judicial legislation should never be encouraged, especially when it is undertaken by inferior courts.

It has been frequently said and is the modern trend of opinion that there are no degrees of negligence, and division into ordinary, gross and light has been characterized as merely the description of negligence with an epithet.

"I can see no difference between negligence and gross negligence. It is the same thing with the addition of a vituperative epithet."

Rolfe, B., in Wilson vs. Brett, 11 M. & W., at p. 116.

"It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

Lord Denman in Hinton vs. Dibbin, 2 Q. B., 650.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authorities."

Mr. Justice Bradley in R. Co. vs. Lockwood, 17 Wall., at p. 382, followed in Briggs vs. Spalding, 141 U. S., at p. 151.

No yard-stick can be invented by which negligence can be measured. No court can attempt to apportion its exact degrees. Even the doctrine of comparative negligence hinted at by a few courts has not met with approbation.

It is an Illinois innovation, and a distinguished text-writer has stated that it will admit of question whether or not it has not created more confusion than anything else. (*2 Wood on Railroads, last ed., p. 1506, sec. 322b.*)

This decision of the circuit court of appeals, tending to divide negligence into degrees, is therefore a step in the direction of an exploded doctrine.

Your petitioners therefore submit that the decision of the lower courts in this case is erroneous:

1. In holding the *Victory* to blame at all.

2. In holding that she violated a rule which has no existence on the inland waters of the United States.

3. In holding that her act in so doing was gross negligence.

4. In holding that she should be made to pay more than half the damages.

5. In not holding the *Plymothian* solely to blame.

And they assign this action as error.

They respectfully submit that in view of the large amounts involved in this case, and of the two exceedingly important legal questions involved, namely, as to the application of the International Rules and as to the proper rule for dividing the damages, it is pre-eminently a case in which this Court should issue a certiorari promptly settling these questions.

Your petitioners herewith file a certified copy of the record in the said cause.

The attention of the Court is called to the fact that the mandate is only suspended until November 1, and the peti-

tioners therefore feel impelled to ask a prompt consideration of this petition by the Court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said circuit court of appeals in the said cause, to the end that said cause may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of said act, and that the said judgment of the said circuit court of appeals in the said cause may be reversed by this honorable Court in the particulars above mentioned.

And your petitioners will ever pray, etc.

PETITIONERS,
By ROB'T M. HUGHES,
Counsel.

STATE OF VIRGINIA,
Corporation of the City of Norfolk, } *To wit:*

Personally appeared Robert M. Hughes, who, being duly sworn, on his oath says that he is counsel for John MacIntyre, Jr., and others, the petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned in the district court of the United States for the eastern district of Virginia and in the United

States circuit court of appeals for the fourth circuit; that he has read the petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

ROB'T M. HUGHES.

Sworn to before me and subscribed in my presence this 21st day of September, A. D. 1895.

[SEAL.]

H. H. LITTLE,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

To The Port of Plymouth Steamship Company, Limited, and to The Canton Insurance Company, Limited; The Triton Insurance Company, Limited; The Indemnity Mutual Marine Insurance Company, Limited; The Atlantic Mutual Insurance Company, The London Assurance Corporation, The Copartnership of C. T. Bowring & Company, The Standard Marine Insurance Company, Limited; The British and Foreign Marine Insurance Company, Limited, and The President and Directors of the Insurance Company of North America:

Take notice that on Tuesday, October 1, 1895, we will file a petition in the Supreme Court of the United States to bring up on certiorari from the circuit court of appeals for the fourth circuit the record in the suit of The Canton Insurance Company, Limited, *et al. vs.* Claimants of Steamship *Victory* and Claimants of Steamship *Plymouthian* and Claimants of Steamship *Victory vs.* The Canton Insurance Company, Limited, *et als.* and Claimants of Steamship *Plymouthian* for the purpose of having the same reviewed and

reversed, and that on Monday, October 14, 1895, we will submit the said petition to the Court for action.

JOHN MACINTYRE, JR.,
THOMAS C. MACINTYRE,
JAMES ALLEN MACINTYRE,
CUTHBERT HUTCHINSON,
PETER ALLEN,
GEORGE Y. BLAIR,
WILLIAM H. GOULD,
JAMES BROTHERTON,
CAROLINE REA,
THOMAS W. SPENCER,
JOSEPH FRAIN,
ANN BLENKINSOP,
MICHAEL J. WILKINSON,
SUSAN WEEKS,
RICHARD LEITCH, and
THE BRITISH STEAMSHIP INVESTMENT TRUST, LIMITED,
By ROB'T M. HUGHES, *Proctor.*

Service accepted September 20, 1895.

WILHELMUS MYNDERSE,
Proctor for Canton Insurance Company, Limited, and Others.

FLOYD HUGHES,
Proctor for Port of Plymouth Steamship Company.

Office Supreme Court U. S.
FILED.
FEB 29 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
Appellant,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Respondents.

No. ~~[illegible]~~ ~~353~~ 66

JOHN MACINTYRE, JR., ET AL.,
Appellants,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Respondents.

No. ~~[illegible]~~ ~~354~~ 67

Notice is hereby given that, upon the papers annexed and upon the records in the above-entitled proceedings, we shall, on Monday, the 2d day of March, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is hereto annexed, to the Supreme Court of the United States at the City of Washington, D. C.

New York, February 25, 1896.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents.

TO WHITEHURST & HUGHES,
Proctors for the Port of Plymouth SS. Co., Ltd.

SHARP & HUGHES,
Proctors for John MacIntyre, Jr., and Others.

SUPREME COURT OF THE UNITED STATES.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *Appellant*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 757.
JOHN MACINTYRE, JR., ET AL., *Appellants*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 758.

Now come The Canton Insurace Company, Limited, The Triton Insurance Company, Limited, The Indemnity Mutual Marine Insurance Company, Limited, The Atlantic Mutual Insurance Company, The London Assurance Corporation, C. T. Bowring & Company, The Standard Marine Insurance Company, Limited, The British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, by Wilhelmus Mynderse, their advocate, and move this Honorable Court to advance the above-entitled causes upon the calendar of this Court and to assign a day for the argument thereof.

WILHELMUS MYNDERSE,
Advocate for Respondents.

SUPREME COURT OF THE UNITED STATES.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *Appellant*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 757.
JOHN MACINTYRE, JR., ET AL., *Appellants*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 758.

Memorandum in Support of Motion.

These causes came into this Court under writs of *certiorari* issued out of this Court, in November, 1895, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit.

The causes arose out of a collision occurring in the Elizabeth River, near Norfolk, Virginia, November 12, 1891, between the steamers *Plymothian* and *Victory*, by reason of which collision both steamers sustained injury, and the cargo of the *Plymothian* was greatly damaged.

Thereupon an action was brought by the Canton Insurance Company, Limited, and others, as insurers and owners of the cargo of the *Plymothian* against the two steamers in the

District Court of the United States for the Eastern District of Virginia.

Thereupon the Port of Plymouth Steamship Company, Limited, owner of the steamer *Plymothian*, and John MacIntyre, Jr., and others, owners of the steamer *Victory*, instituted proceedings for a limitation of their liability, and at the same time contested the question of fault in respect to the said collision.

By the decree of the District Court the steamer *Victory* was held solely responsible for the collision, and distribution of the amount of her appraised value, to wit, $65,000, was directed to be made between the said Port of Plymouth Steamship Company, Limited, and the said Canton Insurance Company, Limited, and others.

Upon appeal to the United States Circuit Court of Appeals the decree of the District Court was reversed, and it was held that the collision was due to the fault of both the *Plymothian* and the *Victory*, and a decree was entered that the respondents herein recover their full damages against the steamer *Victory* to the extent of her value, and that they recover any of their damages then remaining unpaid from the steamer *Plymothian*.

The amount of damages so awarded to the respondents herein aggregates, with interest, to upwards of $90,000.

After the entry of said decree, said Port of Plymouth Steamship Company, Limited, and the said John MacIntyre, Jr., and others, filed their respective petitions in this Court for a writ of *certiorari*.

The said Port of Plymouth Steamship Company prayed for the issuing of such writ upon the grounds :

(a) That the *Plymothian* had been denied the benefit of an exemption in certain of her bills of lading, relieving her from responsibility for the fault of the pilot and for the error of judgment or neglect of the navigators of the vessel, she claiming moreover that by virtue of a further provision in the said bills of lading all questions should be adjusted and decided under English law.

(b) That the provision in the decree of the United States

Circuit Court of Appeals for an unequal division of damages against the *Victory* and *Plymothian* was extraordinary.

The said John MacIntyre and others prayed for the issuing of such writ upon the grounds:

(a) That the International Rules of navigation of 1885, which had been held by the Court applicable, did not cover navigation upon the Elizabeth River or other inland waters of the United States.

(b) That the damages arising from the collision had been unequally apportioned upon the steamers *Victory* and *Plymothian* with such result that the *Victory* bears a far greater proportion of the total loss than she would bear under the usual rule of equal apportionment among wrongdoers.

The respondents submit that as owners and insurers of the cargo of the *Plymothian* they are entirely without fault, and that it is a serious burden to them to be still further delayed in the collection of the amounts due them.

They further submit that an important question involved upon the hearing in this Court is the question as to the division of damages between two vessels, both of whom have, by their fault, contributed to the collision. Such damages have, so far as respondents can ascertain, always, with a single exception, been apportioned equally upon the wrongdoers to the extent of their ability, unequal apportionment being made only when necessary to give complete indemnity to the innocent sufferer. In this case, however, the greater portion of the loss has been put upon the steamer *Victory*, although the steamer *Plymothian* was of more than sufficient value to pay one-half of the loss. The rule of apportionment of damages is one of great public interest, and one affecting a large number of cases. It is important, therefore, that the true rule should be determined by this Court at as early a day as practicable.

Another question involved in these cases, which is of great interest, and affects a large number of cases, is that of the application of the International Rules of 1885 to rivers and inland waters.

Another question of great public interest, and one affecting a large number of cases, is whether a provision exempting a carrier from the consequences of the negligence of his servants, and providing for the determination of that question by the application of foreign law, is valid.

None of these three questions have been passed upon by this Court, and there is a difference in the rulings of District Courts and of the United States Circuit Court of Appeals throughout the country in respect to each one of the questions.

The records from the United States Circuit Court of Appeals have been filed in this Court, and a sufficient number of copies are in print for the hearing of the cause.

Wherefore the respondents pray that these causes may be advanced upon the calendar and set for trial.

WILHELMUS MYNDERSE,
Advocate for Respondents.

FEB 20
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

66

THE CANTON INSURANCE CO., LIMITED, *et al.*, *Appellants*, *vs.* JOHN MACINTYRE, JR., *et al.* — No. ~~[illegible]~~ 366

JOHN MACINTYRE, JR., *et al.*, *Appellants*, *vs.* THE CANTON INSURANCE COMPANY, LIMITED, *et al.* — No. ~~[illegible]~~ 354

67

Reply of Counsel to Motion of Counsel for Shippers to Advance.

The undersigned, counsel for claimants of the steamship Plymothian and the claimants of the steamship Victory, beg leave to state that they concur in the motion of counsel for shippers to advance the cause and set it for its hearing.

The importance of a prompt disposition of the case, outside of the private interests of the parties, arises from the fact that the decision of the Court dividing the damages otherwise than half and half has been reported, and the fact that the Chief Justice took part in it gives it a force which is well calculated to impress the other courts. It is therefore important as early as possible to have the question settled how damages should be divided in cases of mutual fault, as the numerous district courts before whom the

numerous collision cases are pending will inevitably decide the question different ways and cause much confusion.

The question whether the international or supervisor's rules apply in waters inside of the coast line, like the Elizabeth river, is also highly important and should be promptly settled, and the question what effect, if any, should be given to the exemptions in the bills of lading is hardly less so.

For these reasons we concur in the said motion, and hope this honorable Court will see fit to grant the same.

FLOYD HUGHES,
CONVERS & KIRLIN,
Proctors for Port of Plymouth Steamship Company, Limited.
ROB'T M. HUGHES,
Proctor for John MacIntyre, Jr., et al.

[Endorsed:] Case Nos. 16,047 & 16,048. Supreme Court U. S., October term, 1895. Term No., 757. The Canton Ins. Co., Limited, *et al.*, app'ts, *vs.* John MacIntyre, Jr., *et al.* Term No., 758. John MacIntyre, Jr., *et al.*, app'ts, *vs.* The Canton Ins. Co., Limited, *et al.* Consent of counsel for claimants of S. S. "Plymothian" & "Victory" to motion to advance. Filed February 29, 1896.

IN THE

Supreme Court of the United States.

CANTON INSURANCE COMPANY, LIMITED, *et al.*
vs.
JOHN MACINTYRE, JR., *et al.* and THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *et al.* } No. 66.

JOHN MACINTYRE, JR., *et al.*
vs.
CANTON INSURANCE COMPANY, LIMITED, *et al.* } No. 67.

Please take notice that on the 17th day of December, 1897, at the opening of Court, or as soon thereafter as counsel can be heard, a motion will be made to amend the judgment herein by including a direction in regard to the one-half costs adjudged in the decree of the district court to be paid to the *Plymothian* by the *Victory* or her owners, but left in the decree to be paid "out of the bond of $67,500, or by her [*Victory's*] owners, as the appellate court may decide."

New York, December 14, 1897.

Yours, etc.,

FLOYD HUGHES and
J. PARKER KIRLIN,
Counsel for Port of Plymouth Steamship Company, Limited.

To ROBERT M. HUGHES, Esq.,
Counsel for "Victory."

WILHELMUS MYNDERSE, Esq.,
Counsel for Cargo Underwriters.

A copy of this notice has been served on me today, but I object to the same for want of sufficient notice, as it is impossible for me to meet it at that time.

December 15, 1897, 12.15 p. m.

ROB'T M. HUGHES,
For the "Victory."

SUPREME COURT OF THE UNITED STATES.

CANTON INSURANCE COMPANY, LIMITED, *et al.*
vs.
JOHN MACINTYRE, JR., *et al.* and THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *et al.* } No. 66.

JOHN MACINTYRE, JR., *et al.*
vs.
CANTON INSURANCE COMPANY, LIMITED, *et al.* } No. 67.

Comes now The Port of Plymouth Steamship Company, Limited, and moves this honorable Court to amend the judgment of this Court herein by including a direction as to whether the one-half costs adjudged in the decree of the district court to be paid to the *Plymothian* by those interested in the *Victory* shall be paid out of the *Victory's* bond or be paid by the owners of the *Victory* as costs, in addition to the amount of the bond, the decree of the district court with regard to such costs, which by the terms of the judgment of this Court is affirmed, having provided that the said one-half of the costs be paid "out of the bond of $67,500, *or* by her owners, as the appellate court may decide." (Rec., p. 465.)

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
By FLOYD HUGHES and
J. PARKER KIRLIN, *Counsel.*

SUPREME COURT OF THE UNITED STATES.

CANTON INSURANCE COMPANY, LIMITED, *et al.*
vs.
JOHN MACINTYRE, JR., *et al.* and THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *et al.* } No. 66.

JOHN MACINTYRE, JR., *et al.*
vs.
CANTON INSURANCE COMPANY, LIMITED, *et al.* } No. 67.

EASTERN DISTRICT OF VIRGINIA, *ss*.

Floyd Hughes, being duly sworn, says that he is one of the counsel for the Port of Plymouth Steamship Company, Limited, herein. The judgment of the Supreme Court herein provides for the payment of the costs of this Court and of the court of appeals, but with regard to the costs in the district court merely affirms the decree of that court.

In the final decree of the district court there was no definite order as to how or by whom the one-half costs adjudged to be paid by the *Victory* to *Plymothian* should be paid. It was provided (Rec., p. 465) that the Port of Plymouth Steamship Company, Limited, should recover, as the costs of the district court, the sum of $1,681.80, to be paid as follows: One-half from the cargo underwriters and "one-half thereof out of the [*Victory's*] bond of $67,500, *or* by her owners, as the appellate court may decide." (Rec., p. 465.)

The circuit court of appeals did not decide this point, having reversed the decree of the district court, and the judgment of this Court as announced makes no specific direction with regard to this item of the costs.

The cargo claims and the claims of the *Plymothian* for her own damage greatly exceed the amount of the *Victory's* bond. It is important, therefore, for the district court to have the direction of this Court as to whether the said one-half of the costs of the district court are to come out of the bond of the *Victory* or are to be paid by the owners of the *Victory* in addition to the amount of their bond, as it may be doubtful whether the district court would have jurisdiction to vary its own previous decree in this respect, in view of the affirmance of such decree by this Court.

If it had no such jurisdiction and if this Court does not amend the judgment by including a specific direction with regard to those costs, the *Plymothian* will be without remedy in respect of this half of her costs in the district court.

FLOYD HUGHES.

Sworn to before me this 15th day of December, 1897, in my corporation of the city of Norfolk, in the State of Virginia.

Witness my hand and notarial seal.

[SEAL.] JOHN B. JENKINS,
Notary Public.

No. 66.

OCT 14 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

Brief of Hughes & Kirlin for Plymothian (on pet'n)

OCTOBER TERM, 1895—No. ____

IN THE MATTER OF THE PETITION

Filed Oct 14, 1895.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP "PLYMOTHIAN," FOR A WRIT OF CERTIORARI, IN THE SUITS OF

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Appellants,

AGAINST

CLAIMANTS OF THE STEAMSHIP "VICTORY" AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees,

AND

CLAIMANTS OF THE STEAMSHIP "VICTORY,"
Appellants,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees.

BRIEF FOR THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WHITEHURST & HUGHES AND
CONVERS & KIRLIN,
Proctors for Petitioner.

FLOYD HUGHES AND
J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No.

IN THE MATTER OF THE PETITION
OF
THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, the Claimant of the Steamship "PLYMOTHIAN," for a Writ of *Certiorari* in the suits of:
THE CANTON INSURANCE COMPANY, LIMITED, *et al.*,
Appellants,
AGAINST
Claimants of the Steamship "VICTORY" and Claimants of the Steamship "PLYMOTHIAN,"
Appellees,
AND
Claimants of the Steamship "VICTORY,"
Appellants,
AGAINST
THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of the Steamship "PLYMOTHIAN,
Appellees.

BRIEF FOR PORT OF PLYMOUTH STEAMSHIP COMPANY IN SUPPORT OF ITS APPLICATION FOR A WRIT OF *CERTIORARI.*

The facts are sufficiently set forth in the petition and findings of fact contained in the opinion of the District Judge.

POINTS.

I.

The Court below erred in that having expressly found that "it would seem to be manifestly inequitable to assess upon her (*Plymothian*) one-half of the entire loss," it nevertheless proceeded to impose upon her substantially one-half of such loss (Petition, p. 16).

It is assumed, for the argument on this point, that if the Circuit Court of Appeals had not seen fit to introduce the novel doctrine of an unequal division of damages, it would have absolved the *Plymothian* from all fault. The question, therefore, arises whether under the jurisprudence of this Court, the Circuit Court of Appeals ought not on the findings of fact there reached to have dismissed the libel as against the *Plymothian*.

The rule of an equal division of damages was first established in this Court in unmistakable terms in the case of the *Catharine*, 17 How., 170. The Court said (at p. 177):

"Upon this view of the case it becomes necessary to "settle the rule of damages in a case where both vessels "are in fault. The question, we believe, has never until "now come distinctly before this Court for decision. The "rule that prevails in the District and Circuit Courts, we "understand, has been to divide the loss. This "seems now to be a well settled rule in English "admiralty. * * * Under the circumstances "usually attending these disasters, we think the rule di-"viding the loss the most just and equitable, and as best "tending to induce care and vigilance on both sides in "navigation."

This rule was first announced in modern English reports in a *dictum* by Sir William Scott in the case of *Woodrop-Sims*, 2 Dodson, 83, 85, decided in 1815.

The history of the rule as to the division of loss in English law is set forth in a most exhaustive and learned Note in *Marsden's Collisions at Sea*, (3d Edition), at page 145, where it is shown that the principle of equal division of damages in cases where two vessels are in fault has existed in English jurisprudence since 1677. It also

appears, from the same authority (pp. 126 to 130), that this rule is found in the laws of Oleron,* in the laws of Wisby, and in other mediæval maritime codes. The principle of equal division has been uniformly followed in England down to the present date.

Stoomaart Maatschappy vs. *Peninsula Co.*, 7 App. Cases, 795.

The principle of equal division laid down in the *Catharine* (*supra*), has been reaffirmed in numberless cases in this Court.

The *Continental*, 14 Wall., 345.
The *Pennsylvania*, 19 Wall., 125.
The *Teutonia*, 23 Wall., 77.
The *Sunnyside*, 91 U. S., 208.
The *America*, 92 U. S., 432.
The *Alabama and the Gamecock*, 92 U. S., 695.
The *Stephen Morgan*, 94 U. S., 599.
The *City of Hartford and the Unit*, 97 U. S., 323.
The *Virginia Ehrman*, 97 U. S., 309.
The *Connecticut*, 103 U. S., 710.
The *North Star*, 106 U. S., 17.
The *Sterling and Equator*, 106 U. S., 647.
The *Manitoba*, 122 U. S., 97.
The *Britannia*, 153 U. S., 130.

Particular attention is called to the last case as being a case of a libel for damage to cargo against two ships. The *Britannia* was found guilty of grave faults; the *Beaconsfield* was only guilty of too much caution in stoping in the face of what her navigators considered risk of collision, but the Court found she was bound to keep on her course, and divided the damages equally. So here, if the *Plymothian* was not liable for half she should have been absolved.

* "A ship is in a roadstead, moored and riding at her mooring, and another ship strikes her when she is at rest. The ship is damaged by the blow which the other has given her, and there are some wines stove in; the damage ought to be appraised and *divided by halves, between the two ships*; and the wines which are in the two ships, ought to be halved for the damage, between the merchants."

Laws of Oleron, 3 *Black Book of Adm.* (*Twiss*, 21).

II.

The omission of the *Plymothian* to stop at an earlier period than she did, was not a fault under the backing rule (Article 18).

It is seen by the diagram annexed to the plaintiff's petition, which sets forth the positions and courses of the vessels, substantially as found in the District Court, and as apparently approved in the Circuit Court of Appeals, that when the *Plymothian* got straightened out in the channel near buoy 9, and the *Victory* was going up opposite Craney Island Light. Each vessel was in position to pass to the right, and both Courts have found that there was nothing to prevent the adoption of that navigation. There is some conflict in the testimony as to whistles blown by the *Victory* and by the *Plymothian*, but the sum of the evidence appears to be that when the vessels were substantially in the positions BB shown on the diagram, the *Victory* blew two blasts on her whistle and changed her course, which she had not changed up to that time, whether she blew a previous two-blast signal or not. The learned District Judge found that as soon as she blew that whistle and began to swing over towards the easterly side of the channel and towards the *Plymothian's* course, the *Plymothian* gave alarm signals, reversed and went full speed astern, and was actually stopped still, if not making sternway in the water at the time of the collision. These findings do not appear to be upset by the decision of the Circuit Court of Appeals. The charge against the *Plymothian* in the Circuit Court of Appeals is that she did not stop when an earlier whistle was claimed to have been blown by the *Victory*.

At the time the earlier cross-signal of the *Victory* is claimed to have been blown, the District Judge finds that the vessels were more than a thousand yards apart (Petition, p. 31), and that there was at that time abundant time and room for the *Victory*, upon receiving a single blast whistle from the *Plymothian* (which that vessel subsequently gave), to correct her intended error and keep on her own side of the channel.

The *Plymothian* was justified in presuming that the other vessel would perform her duty and keep to the right on her own side of the channel, as both the law and the custom of navigation required.

New York Co. v. *Philadelphia Co.*, 22 How, 461.
The *Scotia*, 14 Wall., 170.
The *Free State*, 91 U. S., 200.
The *Illinois*, 103 U. S , 298.
The *Bridgeport*, 6 Blatch., 3.
The *Northfield*, 154 U. S., 629.

As soon as she began to swing, making an actual risk of collision, the statutory measures were immediately adopted by the *Plymothian*.

To hold that the *Plymothian* should have taken earlier precautions than she did, is in effect to hold that a vessel about to be run down, through the flagrantly negligent navigation of another, must not only stop and back, but must run away astern through the water from the wild course of the other. It is virtually holding that as towards cargo, each vessel absolutely insures against collision damage, and if the one upon which the Court thinks the damage legally ought to be imposed is not able to pay them, then the other, if she has not done everything possible—not only what is reasonably required of her, in the way of navigation, but everything which possibly could be done—she must make up the deficit.

It is assumed for the purpose of this argument that the International Rules here apply, and that by Rule 21, the *Plymothian* was on the right side of the channel, and the *Victory* was bound to be on the other side, and that nothing prevented her from being there.

If Rule 21 did not apply, but the regulations contained in the Revised Statutes of the United States did apply, then when the risk of collision became involved, the vessels must either have been under the meeting rule or under the crossing rule (Rev. Stat., Sec. 4233, Rule 18 or Rule 19). If they were under the meeting rule, when risk of collision became involved, it was plainly the duty of the *Victory* to port; and if they were under the crossing rule,

then by the decision of this Court in the *Britannia* (*supra*), it was the duty of the *Plymothian* to keep on and rely upon the presumption that the *Victory* would keep out of the way.

The claim that the *Plymothian* was in fault for not backing earlier, is based upon a most stringent application of the stopping and backing rule.

This Court, in the *Free State*, 91 U. S., 200, held that a steamer is not bound to take any steps to avoid a collision until danger of collision is apparent. That it is not the law, that the steamer must change her course or slacken her speed the instant she comes in sight of another vessel, if there is no danger of collision.

That remark would seem to have the clearest application to the situation of the vessels at the time the *Victory* claims to have blown her first two-blast signal when she and the *Plymothian* were substantially in the positions shown by A A on the diagram annexed to her petition.

Mr. Justice HUNT, in the *Free State*, said:

"The appellants insist that the rule of law is this: If "where a steam vessel is approaching another vessel, and "where a collision *might be produced* by a departure of "the latter from the rules of navigation, the former ves- "sel is bound to slacken her speed or stop and reverse. "We have examined with care the authorities cited by "the appellants, but we found none that sustain this "proposition. The rule is otherwise."

This rejected doctrine is substantially that on which the Circuit Court of Appeals attached fault to the *Plymothian* in this case.

It is not contended that at the time the *Victory* claims she blew her alleged first two-blast signal, that she made any change of course, or that she made any change of course until after she blew her second two-blasts when she was in the position B. Meantime, the *Plymothian* had blown her two single blasts which the *Victory* ought to have heard, one of which she did hear, both of which she was bound to notice and to follow. As above shown the decisions of this Court hold she had a right to presume

the *Victory* would heed them, and as soon as it was apparent the *Victory* would not do so, the other statutory duties were instantly and fully performed. This was enough.

New York & Baltimore Co. v. *Phila. & Savannah Co.*, 22 How, 461.

In the *Adriatic*, 107 U. S., 512, this Court absolved a steamer from all blame from a collision in which she sunk a sail vessel, where it was found that the steamer had stopped and reversed when the risk of collision first became apparent.

See also the *John King*, 1 U. S. App., 64.

In the *Cement Rock*, 38 Fed. Rep., 764, BROWN, *J.*, said:

"The primary fault being on the part of the *Cement* "*Rock*, all that was incumbent upon the *Alaska* was to "stop and reverse so soon as she had reason to apprehend "that the *Cement Rock* could not or would not clear her "either by crossing or by going to the right. Consider- "ing the ease with which the *Cement Rock* was handled, "and the fact that the *Alaska* must have been nearly, if "not quite stopped, I do not feel justified in holding that "she did not reverse as soon as it was evident that the "*Cement Rock* could not be expected to clear without the "*Alaska's* co operation; and unless that is reasonably "plain, upon a preponderance of proof, the vessel having "the original right of way is not to be charged with "fault."

English cases hold, that where vessels are substantially meeting, but are on courses free from danger, provided neither changes, there is no risk of collision, under Article 18, until one of the vessels manœuvers towards the course of the other; and if at such time, the other stops and reverses promptly, she is absolved from responsibility for collision brought about by the wrongful manœuver of the other vessel.

The *Jesmond* and the *Earl of Elgin*, L. R., 4 P. C., 1.

The *Rhondda*, 8 App. Cas., 549.

See also the *Milwaukee*, Brown's Adm., 313.

It is not shown that stopping earlier would have affected the result (Petition, pp. 10-11).

III.

If the Circuit Court of Appeals intended in its opinion to reverse the findings of fact of the District Court, it erred in so doing, as the great majority of the witnesses were examined before the District Judge, and his findings cannot be said to be *clearly* against the preponderance of testimony.

It is a familiar rule in appellate practice that where the witnesses have been examined before the District Judge, and the evidence discloses conflicts, upon which the credibility of the witnesses has a bearing, Appellate Courts do not reverse the findings of fact, unless they appear to be clearly against the weight of evidence.

The *Grafton*, 1 Blatch., 173.
The *Sampson*, 4 Blatch, 28.
The *Florida*, 4 Blatch., 470.
The *Sunswick*, 5 Blatch., 280.
The *Guimarais Appeal*, 28 Fed. Rep., 528.
The *Thos. Melville*, 37 Fed. Rep., 271.
The *Albany*, 48 Fed. Rep., 565.
The *Alijandro*, 56 Fed. Rep., 621.
The *City of New York*, 54 Fed. Rep., 181.
The *Wilhelm*, 59 Fed. Rep., 169.

In the cases at bar the evidence was conflicting. Two pilots and seventeen of the twenty-one disinterested eye-witnesses were examined in open court; the District Judge is one of more than twenty years experience in that district, is thoroughly acquainted with the waters in which the collision occurred, and the needs of navigation therein; is presumed to know, and did know, personally many of the disinterested eye-witnesses, who, being tugboat men, making their living in these waters, were able to give, and did give, the most intelligent account of the collision, from an unbiased standpoint and free from the excitement of impending danger. He was, therefore, peculiarly fitted to judge of their credibility, to properly weigh this con-

flicting testimony and to arrive at a just and proper conclusion. His conclusion, freeing the *Plymothian* from fault upon the facts, will be found, after examination of the accompanying record, to be not only not *clearly* against the preponderance of testimony, but fully sustained by the great weight of it.

IV.

The steamship *Plymothian*, if at fault for the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

It admits (by a stipulation and exhibits, Record, p. 483–493) that every bill of lading issued by the master of the *Plymothian* for the cotton constituting this cargo, and injured as a result of this collision, contained two clauses, familiarly known as the "Negligence" clause and the "Flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage "occasioned * * * by collisions, stranding or other "accidents of navigation of whatsoever kind (even when "occasioned by the negligence, default, or error in judg- "ment of the *pilot*, master, mariners or other servants of "the shipowner) * * *" (R., 487–489–490).

It must be conceded that if the fault was committed on the part of the *Plymothian*, it arose from the negligence, default or error in judgment of the Virginia pilot, who was in charge of navigation, and was thus clearly within the foregoing exemption, if permitted to stand. Negligence, if any, on the part of her officers, is equally within the exemption.

The "Flag" clause is as follows:

"*This contract shall be governed by the law of the* "*flag of the vessel carrying the goods*, except that general

"average shall be adjusted according to York-Antwerp "Rules, 1890. In accepting this bill of lading, the ship- "per, owner and consignee of the goods and the holder of "the bill of lading agrees to be bound by all its stipula- "tions, exceptions and conditions, whether written or "printed, as fully as if they were all signed by such ship- "per, owner, consignee or holder, any custom of the port "notwithstanding" (R., 488-492).

By stipulation it is further agreed that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the brief and upon the arguments of counsel to such printed reports, as proofs in this case of the law of Great Britain in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the record (R., 484).

The attention of the Court is called in the petition (p. 15) to illustrative cases showing the English law. An exhaustive investigation of the state of English law on this subject has lately been made by this Court in the case of *Phœnix Insurance Co. against Liverpool et al., Insurance Co.*, 129 *U. S.*, 397.

This case, therefore, brings before the Court for determination a question never here decided, namely, whether the negligence clause exempting the ship from responsibility from the negligence of her compulsory pilot, or of its own officers, navigating the ship in conjunction with such pilot, will be upheld as a valid contract between the parties, where the contract itself expressly provides that it is to be governed by the law of the country to which the steamship (one party to the contract) and the consignee of the merchandise, under the bill of lading, belong.

The intimations of the Supreme Court are that where the parties by the contract show a mutual intention that it shall be governed by the law of a particular country, it will be governed by that law, except only in cases where the contract is illegal or immoral.

In *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 U. S. 397–458, Mr. Justice GRAY, in delivering the opinion of the Court, said:

"This review of the principal cases demonstrates that "according to the great preponderance, if not the uniform "concurrence of authority, the general rule, that the "nature, the obligation and the interpretation of a con- "tract are to be governed by the law of the place where "it is made, *unless the parties at the time of making it* "*have some other law in view*, requires a contract of af- "freightment, made in one country between residents or "citizens thereof, and the performance of which begins "there, to be governed by the law of that country, *unless* "*the parties when entering into the contract manifest a* "*mutual intention that it shall be governed by the law of* "*some other country.*"

The English rule is the same.

The *Industrie* (1894), Probate 58.

The Circuit Court of Appeals for the Second Circuit in the *Majestic*, 60 Fed. Rep., 624, supported this specific clause and held that nothing stood in the way of its enforcement. The point there arose in regard to damage to a passenger's baggage damaged in transit, and the steamship relied upon an exemption from negligence on the passenger's ticket, which also contained this clause:

"All questions arising on this contract shall be de- "cided according to English law, with reference to which "this contract is made."

SHIPMAN, Circuit Judge, construing that contract (p. 627), said:

"The contract was made in London or in Liverpool, "where the shipowner had a place of business, between "a British corporation, which was the shipowner, and a "citizen of the United States. The contract was for the "transportation on the high seas of passengers and their "baggage from the City of Liverpool to the City of New "York; and if the statement that it was made with ref- "erence to English law had been omitted nothing in the "contract would have indicated an intent that it was to "be controlled by the law of the United States. *Under* "*such circumstances it was an English contract and gov-* "*erned by the law of England.*"

The same point with regard to a passenger's baggage arose upon similar circumstances in *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553. KNOWLTON, *J.*, in delivering the opinion of the Court, said:

"The contract being valid in England, where it was "made, and the plaintiff's acceptance of it under the cir- "cumstances being equivalent to an express assent to it, "*and it not being illegal or immoral*, it will be enforced "here, notwithstanding that a similar contract made in "Massachusetts would be held void as against public "policy (*Greenwood* v. *Curtis*, 6 Mass., 358; *Forepaugh* "v. *D. L. & W. Ry.*, 128 Penn. St., 217; and cases cited: "*In re Missouri S. S. Co.*, 42 Ch. D., 321, 326, 327; *Liv- "erpool Co.* v. *Phenix Ins. Co.*, 129 U. S., 397)."

The clause which was before the Court in the *Majestic* (*supra*) was also sustained and enforced by Judge MORRIS in the *Oranmore*, 24 Fed. Rep., 922, 928, under a contract made in Baltimore for the shipment of cattle to Liverpool.

In dealing with that clause of the contract which called for the application of English law (p. 927), he held:

"The presumption is that the parties enter into a con- "tract with reference to the law of the place where it is "made, but this presumption is easily overthrown by cir- "cumstances which show that this was not the intention "of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.*, 6 Pet., 203, it is said by the Supreme "Court:

"'The law of the place where the contract is made is to "govern in expounding and enforcing the contract, unless "the parties have a view to its being executed elsewhere, "in which case it is to be governed according to the law "where it is to be executed.'

"The present question is not one which affects the "capacity of the parties to make the contract. It is not a "case in which, according to the American law, it could "be said that there is no contract at all binding on the "parties. It is merely a question of the extent and nature "of the obligations and conditions of a contract. The "law is thus stated in *Story Confl. Laws*, 242:

"'Generally speaking the validity of a contract is to be "decided by the law of the place where it is made, unless "it is to be performed in another country; for, as we shall "presently see, in the latter case the law of the place of "performance is to govern.'

" At page 280 he further said:

" 'The rules already considered suppose the performance
" of the contract to be in the place where it is made,
" either expressly or by tacit implication. But where the
" contract is expressly or tacitly to be performed in any
" other place, there the general rule is, in conformity to
" the presumed intention of the parties, that the contract,
" as to its validity, nature, obligation and interpretation
" is to be governed by the law of the place of perform-
" ance.'

"And the author cites as clearly expressing the rule,
" the statement of Lord Mansfield:

" 'The law of the place can never be the rule where the
" transaction is entered into with an express view to the
" law of another country as the rule by which it is to be
" governed.'

" In *Whart. Confl. Laws*, 472, it is stated to be a rule
" fairly deducible from adjudged cases that where there
" are no other controlling circumstances, a contract of
" carriage is to be interpreted by the law of the carrier's
" principal office. In this case, although the contract was
" made in the United States, it was made in the port of
" Baltimore by a resident of Chicago with a British cor-
" poration for carriage in a British ship to a port in Great
" Britain, and the express agreement of the parties, delib-
" erately made two months before the shipment, was that
" any question arising against the carrier under the con-
" tract or the bill of lading should be determined by the
" English law.

" Under all these circumstances, it seems to me the
" Court should give effect to the clause of the agreement.
" *It leaves the intention of the parties beyond doubt of*
" *any kind, and that intention was to give the provisions*
" *of the bill of lading such efficacy as the English Courts*
" *would give to them.* As I understand the facts of the
" case and the rulings of the English Courts upon similar
" bills of lading, I think the exceptions cover the injuries
" sustained by this libelant, and the libel must be dis-
" missed."

This case was affirmed on appeal by Judge BOND; decision unreported.

The uniform concurrence of authority and of opinion, as expressed in text books on this subject, is that the validity and construction of the contract are to be tested by the law which the parties intended should govern their rights, unless the contract be intrinsically unjust or im-

moral, or contrary, not to the public policy of the forum as regards a single branch of municipal law, but to the national policy or institutions of the government, in which the contract is sought to be enforced.

It was plainly intimated in the MONTANA opinion (129 U. S., at p. 458), that if there had been any express provision in the bill of lading referring to the English law as the law of the contract, that law would have been enforced, and the steamship company would not have been liable. After stating the general rule with the qualification, "*unless the parties when entering into the contract manifest a mutual intention that it shall be governed by the law of some other country*," the Court further said:

"There does not appear to us to be anything in either "of the bills of lading in the present case tending to "show that the contracting parties looked to the law "of England or to any other law than that of the place "where the contract was made."

This passage appears to have reference to cases such as The ORANMORE, 24 Fed. Rep., 922, 928, and the present, where a mutual design to contract under a stated foreign law is shown on the face of the contract itself.

There is not the slightest intimation anywhere in the MONTANA opinion that if such a stipulation as we have in the present case had been in the bills of lading there considered, the Court would have found anything in the public policy of this country standing in the way of its enforcement.

The opinion of Mr. Justice GRAY recognizes and affirms the rule as declared by Lord Mansfield, before the Declaration of Independence, and which is thus authority binding upon American courts, until overruled by an American court of appellate jurisdiction, in the case of *Robinson* v. *Bland*, 1 William Blackstone, 213, that "*the* "*general rule, especially ex comitate et jure gentium*, is, "that the place where the contract is made and not "where the action is brought, is to be considered in "expounding and enforcing the contract; but this rule "admits of an exception where the parties, at the time

"of making the contract, had a view to a different "kingdom."

Other cases where the foreign law has been applied, are:

The *Carib Prince*, 63 Fed., 266; 68 *Id.*, 254.
The *Triniacria*, 42 Fed., 863.
Baetjer v. *Compagne Generale*, 59 Fed., 789.

What is the objection to settling the questions which have now arisen, and are here in judgment, according to the law which the parties have deliberately chosen?

The point has not arisen before, as far as we can find, with reference to a pilot.

In some District Court cases it has been said that to permit, subversive of the doctrines and policy of our Federal laws, carriers to exempt themselves from the results of their *servants'* negligence would be subversive of our public policy.

The *Iowa*, 50 Fed., 561.
The *Energia*, 56 Fed., 124.
The *Hugo*, 57 Fed., 403.
Lewisohn v. *Natl. S. S. Co.*, 56 Fed., 602.

Such might indeed be the *effect* if the *servants* were here in fact, but it is fallacious to argue that therefore such was the *design*. We have here a printed form of bill of lading. It does not refer to the *English* law *eo nomine*. If merchandise were shipped under it upon a Spanish, French or American vessel, the law of the flag would be the law to be applied, irrespective of the destination. The clause embodies a principle of general application, and is not intended to prefer any particular law in general over any other law: it leaves everything to go by the law of the ship's country. It is no sound reason for refusing to uphold such a provision that as applied to a particular instance it overrides our own law, unless the contract is illegal or intrinsically immoral.

Indeed, no sound reason is perceived why our courts should refuse to effectuate a preference distinctly expressed by the parties to a contract, for some other law than our own, if they think such other law more equitable or just,

or want it for other reasons, even though our Judges should think the parties ought not to prefer it or want it as a rule for settling their contracts.

The District Court cases in the Second Circuit, which have held that the foreign law should not be applied to sustain a negligence exemption, must be deemed to be overruled by the subsequent case of the *Majestic*, 60 Fed., where their reasoning is disapproved. The case of the *Hugo*, above cited, came before the Circuit Court of Appeals, and was decided upon grounds which made it unnecessary to determine this point; but an application was subsequently made to this Honorable Court for a writ of *certiorari*, on the ground that the validity of the so-called "flag clause" was necessarily involved in the case, and in April, 1895, this Court issued its writ as prayed. The exact point is now before your Honors for decision.

The validity of contracts is usually tested by the *lex loci contractus*, as that which the parties presumably contemplated in entering into their agreements. If we take the expression of the parties upon this point as better evidence of intention than presumption, the cases that have laid down the rule as to when the *lex loci* shall afford the rule for expounding the contract, will show equally when the deliberately chosen law can be applied.

What, then, is the general rule and what are its exceptions?

In *Harrison* v. *Sterry*, 5 Cranch, 289, Chief Justice MARSHALL laid down the rule broadly that

> "The law of the place where the contract is made is, "generally speaking, the law of the contract; that is, "it is the law by which the contract is expounded."

In *Van Reimsdyk* v. *Kane*, 1 Gallison, 371, 375, Judge STORY, in dealing with a contract made in Java, stated the limitations upon the principle as follows:

> "The rule is well settled that the law of the place "where a contract is made is to govern as to the nature, "validity and construction of such contract; and that "being valid in such State, it is to be considered as "equally valid and to be enforced everywhere, *with the "exception of cases in which the contract is immoral or*

"*unjust, or in which the enforcing it in a State will be* "*injurious to the rights, the interest or the convenience* "*of such State or its citizens.* This doctrine is explicitly "averred in *Huberus De Conflictu Legum*, 2 Tombe, lib. "1, tit. 3, and has become incorporated into the code of "national law in all civilized countries" (citing many authorities).

On appeal, 9 Cranch, 153, at p. 162, MARSHALL, *C. J.*, said:

"There is no evidence that the contract is not allow- "able by the laws of Batavia; nor did the owners when "informed of it complain of its terms. The Court cannot "presume that it is illegal."

In his *Conflict of Laws*, Secs. 244, 245, 246, Judge Story deals with the limitations above suggested upon the general principle, and the only cases falling within the limitations, in support of which his great learning could furnish any authority, are (1) contracts in fraud or evasion of the customs laws of the forum; (2) contracts for distribution of proceeds of prize, resulting from collusive capture and condemnation procured in our courts by enemies; (3) cases to recover the price of slaves sold abroad; to which a distinguished French writer, *Foelix* 1 *Droit International Privé*, 256, adds another category, namely (4), cases of gambling contracts, and those relating to lotteries.

Plainly our policy regarding negligence clauses falls within none of these classes.

KENT, 2 Com., 444–5, lays down the rule thus:

"The necessary intercourse of mankind requires that "the acts of parties, valid where made, should be recog- "nized in other countries, provided they be *not contrary* "*to good morals, nor repugnant to the policy and posi-* "*tive institutions of the State.*"

The exceptions of his definition obviously refer to something more than the mere policy of a country in a single branch of its municipal law; they relate to matters opposed to the fundamental principles upon which the Gov-

ernment exists, *e. g.*, contracts for traffic in slaves, or touching smuggling or piracy.

In Hon. David Dudley Field's *Outlines of an International Code*, Articles 602, 603, the rule upon this matter was proposed as follows:

"602. Subject to Articles 604 and 605, a contract made "within the jurisdiction of one nation, and agreed ex- "pressly or tacitly to be performed either wholly or "partly within the jurisdiction of another, is governed "as to its validity by the law of the place where it is "made; and as to its interpretation, by the law actually "or presumptively intended by the parties for that pur- "pose, as provided in the next article.

"603. The law intended by the parties to govern the in- "terpretations of any stipulation of their contract is "deemed to be:

"1. The law of any nation named by them as part of "their contract; or

"2. *If no such law is so named*, the law of the place "which such stipulation is agreed to be wholly per- "formed; or

"3. If no such law or place of performance is specified, "the law of the place of the making of their contract; "but in this case a contrary intention may be shown."

Articles 604 and 605 proposed to except from the operation of these rules the cases only (1) a contract forbidden by an *express* provision of law, or (2) which is unlawful everywhere in civilized countries, or (3) is made with intent to violate an *express* provision of this Code or of the laws of any nation a party to the Code.

It was never suggested in the proceedings of the Society for the Codification of the Law of Nations that these sections proposed any innovations upon the generally received rule, or placed any restriction upon the acknowledged classes of exceptions in which the rule is not to be observed.

FOELIX, the most distinguished modern Continental writer on the subject, states the general rule as practised in countries following the Civil Law (1 *Droit International Privé*, p. 223) as follows:

"Le principe général en cette matiére est que les parties "contractantes ont eu l'intention de se conformer, dans

" leur conventions à la loi du lieu où celles-ci ont été
" consenties et sont devenues parfaites, et par suite de les
" soumettre à cette loi; en d' autres termes, que la valeur
" intrinsèque, la substance, le lien, *vinculum juris*, des
" conventions depend de la loi du lieu où elles ont recu
" leur perfection; l'acte valable où nul d'après cette loi
" le sera également partout " * * *

" Lorsque les contractants *n'ont pas expressément adopté*
" la loi de lieu où le contrat a été passé alors commence
" les presomptions " (p. 225).

" Lorsque le divers contractants n'ont pas la même pat-
" rie le même domicile, on ne saurait donner la préférence
" aux lois de la patrie où du domicile de l'un d'eux ni juger
" sur l'intention que l'un d'eux pretendrait avoir eue de
" se rapporter aux lois et usages de sa patrie; car il est
" de l'essence de toute convention qu'il y ait consentement
" commun des parties sur tout ce que compose le contrat.
" Dès lors on a dû admettre que leur volunté s'en rap-
" portée à une loi commune et par un accord à peu près
" unanime, les auteurs et les tribunaux ont admis en
" principe qu'il faut s'arrêter à la loi du lieu où le contrat
" a été passé " (p. 228).

To this effect *Story, Conflict of Laws*, Sections 239, 240, 241, 242.

FOELIX states the exception thus: " Lorsque le contrat est contraire aux bonnes moeurs ou aux institutions ou prohibitions existant dans le pays où il doit recevoir son exécution ou lorsqu, il porte prejudice soit aux intérêts d'une nation, soit aux droits acquis par les citoyens de cette nation" (p. 235).

It is noteworthy that he does not include public policy within the exception.

The English Courts have not always admitted the exceptions to the rule as broadly as we admit them. They enforced foreign contracts for the execution of purposes illegal according to English law, although legal by law of the place of contract. When, for example, a foreigner has contracted with a subject, or even a subject with a subject, without the country for a supply of goods to be run into England in fraud of the French revenue law, the vendor himself having taken no active part over and above the mere knowledge of the intent in the smuggling

transaction, English courts have supported the contract against the vendee (*Holman* v. *Johnston*, Cowp., 341; *Biggs* v. *Lawrence*, 3 Durn. and East., 459; *Clugas* v. *Penaluna*, 4 Durn. and East., 466; *Vandyek* v. *Hewitt*, 1 East., 96; *Waymell* v. *Read*, 5 Durn. and East., 596).

The English judges have even upheld a contract for the sale of a slave made within a State where slavery is a legal institution, although slavery is abhorrent to the English national conscience and slave trade is, in an English subject, piracy.

Santos v. *Illidge*, 6 C. B., N. S., 841.

The King's Bench has approved a verdict with ruinous damages given against the commander of an English man-of-war on action by the Spanish owner of a captured slaver in days when Spain had not yet entirely discountenanced traffic in slaves.

Said BEST, *J.*:

"The statutes which have been referred to speak in "just terms of indignation of the horrible traffic in human "beings; but they speak only in the name of the British "nation. The declaration of the British legislature, that "the slave trade is contrary to justice and humanity, "cannot affect the subjects of other countries or prevent "them from carrying on this trade out of the limits of "the British dominions. The assertion of the right to "control the subjects of other States in this respect would "be inconsistent with independence, which we acknowl-"edge that every foreign government possesses. If a ship "be acting contrary to the general law of nations, she is "thereby subject to confiscation; but it is impossible to "say that the slave trade is contrary to what may be "called the common law of nations. It was, until lately, "carried on by all the nations of Europe. A practice so "sanctioned can only be rendered illegal by the consent "of all the powers. Most of the States of Christendom "have now consented to the abolition of the slave trade, "and concurred with us in declaring it to be unjust and "inhuman. These subjects of any of these States could "not, I think, maintain an action in the Courts of this "country for any injury happening to them in the prose-"cution of this trade; but Spain has reserved to herself "the right of carrying it on in that part of the world "where this transaction occurred. Her subjects could

" not be legally be interrupted in buying slaves in that " part of the globe, and have a right to appeal to the jus- " tice of this country for any injury sustained by them " from such an interruption."

Madrazo v. *Willis*, 3 Barn. and Ald., 353.

As pointed out by Chancellor KENT (2 Comment., 455), if one independent State allows commercial intercourse and contracts between its citizens and those of another, the rights of the parties and the relations between them would seem to have a higher right than mere comity—a claim of justice, a right to demand performance of valid, legal and moral conventions in whatever Court such rights and obligations are the subject of judicial inquiry. Not to do that is in effect to say that a contract valid, if sued on in Paris, in Berlin or in London, will be void if sued on in the courts of the United States; and to refuse to apply the governing law the parties have explicitly chosen, is to affirm that no agreement of the parties, however solemn or explicit, can obviate that unfortunate result. Moreover, it is to say that a contract may not be enforced at one period in courts of the United States, when a certain condition of public policy prevails, although a similar contract made at a different time may be enforced, if Congress should chance to decide upon a different public policy; for public policy changes with the passage of time and with the course of legislation.

In the *United States* v. *Trans-Missouri Freight Association*, 58 Fed., 58, SANBORN, *J.*, in delivering the opinion of the Circuit Court of Appeals upon a question involving considerations of public policy (at p. 68) said:

" But when it becomes necessary to consider grounds " of public policy in the determination of a case, it is " well to bear in mind the oft-quoted remark of Justice " Burrough in Richardson *v.* Mellish, 2 Bing., 252, that " public policy ' is a very unruly horse, and when you " get astride of it you never know where it will carry " you. It may lead you from the sound law.' Public " policy changes with the changing conditions of the " times."

It is for this reason that the courts of high authority have refused to admit cases of contracts opposed to pub-

lic policy, as an exception to the general rule, along with those that are illegal or immoral. To say that an exemption from the negligence of one's servants is unjust or immoral is to run counter to the view prevailing in every maritime country in Europe, in most of those of South America and in many States of the Union. Hence it is that the highest courts of many of the States have declined to consider it as falling within the exception to the general rule.

Fonseca v. *Cunard*, 153 Mass., 553.
Forepaugh v. *Delaware Ry.*, 128 Penn. St., 217.
Brown v. *Browning*, 15 R. I., 422.
Gross v. *Jordan*, 83 Maine, 380.
Dugan v. *Lewis*, 79 Texas, 246.

The contract here in question is not opposed to any public policy prevailing at the present time. The third section of the act of Congress entitled "An Act relating to Navigation, Bills of Lading," &c., approved February 13, 1893, provides:

"That if the owner of any vessel transporting mer-
"chandise or property to or from any port in the United
"States of America, shall exercise due diligence to make
"the vessel in all respects seaworthy and properly manned,
"equipped and supplied, *neither the vessel or owner, or*
"*owners*, agents, or charterers, *shall become or be held re-*
"*sponsible for damage or loss resulting from faults or*
"*errors of navigation or in the management of said ves-*
"*sel.*"

If that statute were the law for the present case, and the Court should reach the conclusion that the loss arose from negilence of the pilot, then so far from an exemption against such damage being contrary to our public policy, the specific loss would fall within an exemption provided by national legislation.

The *Silvia*, 64 Fed., 607.
The *Elona*, 64 Fed., 880.

In the *Silvia*, on appeal to the Circuit Court of Appeals (68 Fed., 230), WALLACE, *Circuit Judge*, in affirming the decree below, said:

" Read as a whole, the purpose of the act manifestiy is, " on the one hand, in the interests of the public to prevent " carriers from evading responsibility to exercise due dili- " gence in providing sea for vessels, and in the handling " and care of the cargo; and on the other hand, whenever " they have exercised due diligence in these respects, to " absolve them from liability for loss arising during the " transit, from the perils of the sea and from faults or " errors in the navigation or management of vessels."

It is noticeable that none of the cases under the law as it stood before the Act of 1893, dealt with an exception from liability for faults or errors in navigation by a *pilot*. The language of the statute is most apt to include such negligence and to relieve the shipowner from it. While that act has no direct bearing on the present controversy, it may be looked at as a legislative view of public policy, and as showing the futility and substantial injustice of adding to the few exceptions to the great rule that the chosen law of the contract should be applied in its interpretation, a principle of such slight consequence that it is subject to be changed by legislative enactment from time to time, even between the occurrence of accidents and the trial of cases growing out of them, in the ultimate Court of Appeal.

Last Point.

The petitioner's application for a writ of *certiorari* herein should be granted.

Respectfully submitted,

WHITEHURST & HUGHES, and
CONVERS & KIRLIN,
Proctors for Port of Plymouth Steamship Company,
Petitioner.

FLOYD HUGHES,
J. PARKER KIRLIN,
Of Counsel.

Nos. 66 and 67.

Brief of Floyd Hughes for the Plymothian

OCT 25 1897
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

Filed Oct. 26, 1897.

No. 66

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), PETITIONER FOR LIMITATION OF LIABILITY, AS OWNER OF THE S. S. PLYMOTHIAN

Appellant in this Court

against

THE CANTON INSURANCE COMPANY (LIMITED), AND OTHERS, UNDERWRITERS ON CARGO, AND JOHN McINTYRE AND OTHERS, OWNERS OF THE STEAMSHIP VICTORY, CLAIMANT

Appellees in this Court

No. 67

JOHN McINTYRE AND OTHERS, PETITIONERS FOR LIMITATION OF LIABILITY, AS OWNERS OF THE STEAMSHIP VICTORY

Appellants in this Court

against

CANTON INSURANCE COMPANY (LIMITED), AND OTHERS, UNDERWRITERS ON CARGO, AND PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), OWNER OF STEAMSHIP PLYMOTHIAN, CLAIMANTS

Appellees in this Court

BRIEF FOR PLYMOTHIAN

FLOYD HUGHES

Of Counsel for Plymothian

INDEX.

PAGE

STATEMENT 1

POINTS:

I. The *Victory*, passing Craney Island, was not on the eastern edge of the main ship channel, but was at least in mid-channel, if not further to the westward 7

II. The *Victory* was not forced to the eastern edge of the channel by passing vessels 10

III. The *Victory* being in mid-channel, if not to the westward at Craney Island, and the *Plymothian* in mid-channel, or to the eastward, off buoy 9, each should have ported and passed port to port 13

IV. The *Victory* did not give the first signal, but the *Plymothian* did, which was not answered by the *Victory* until twice repeated, and then by a cross-signal 17

V. The *Victory* was under excessive speed, and did not promptly stop and reverse 19

The *Victory's* speed 21

Answer to Ralli Brothers' Libel, R., 436, 439 24

Contradictions of *Victory's* master and pilot 25

THE NAVIGATION OF THE "PLYMOTHIAN" 30

VI. The *Plymothian* did not cross over to the western side of the channel, but moved down the eastern side of the channel under a port helm, her proper course 30

VII. The *Plymothian's* whistle was not defective 38

VIII. The *Plymothian* signaled first and properly 40

IX. The *Plymothian* was moving under moderate speed, and on the first indication of *Victory's* change of course, promptly stopped and reversed, with headway at collision entirely overcome 40

The *Plymothian's* helm 52

The Log 53

PAGE

X. Result of the decision of Circuit Court of Appeals much more disastrous to owners of *Plymothian* than contemplated by that Court 56

XI. The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading 58

XII. The decision of the Circuit Court of Appeals should be reversed and the decision of the District Court restored in its entirety 61

Supreme Court of the United States,

OCTOBER TERM, 1897.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Petitioner for limitation of liability, as owner of S. S. *Plymothian*,
Appellant in this Court,

AGAINST

THE CANTON INSURANCE COMPANY (LIMITED), and others, Underwriters on Cargo, and JOHN MCINTYRE and others, owners of the Steamship *Victory*, claimants,
Appellees in this Court.

No. 66.

JOHN MCINTYRE and others, Petitioners for limitation of liability, as owners of the Steamship *Victory*,
Appellants in this Court,

AGAINST

CANTON INSURANCE COMPANY (LIMITED), and others, Underwriters on Cargo, and Port of Plymouth Steamship Company (Limited), owner of Steamship *Plymothian*, claimants,
Appellees in this Court.

No 67.

BRIEF FOR PLYMOTHIAN.

On the afternoon of Thursday, November 12, 1891, a collision occurred on the eastern edge of the main ship channel of the Elizabeth River, about half a mile below

Lambert's Point, between the British steamship *Victory*, bound up the river to the port of Norfolk, Va., light, for cargo, and the British steamship *Plymothian*, which, bound on a voyage from Galveston, Texas, to Liverpool, with a cargo of 3,682 bales of cotton, had that morning put into Lambert's Point for bunker coal, and was proceeding to sea. In the collision aforesaid the steamship *Victory* was injured to some extent forward, and the steamship *Plymothian*, struck by the bow of the *Victory* on her port side, was so seriously injured that she, in the course of a few moments, with her said cargo, sank in shoal water on the eastern side of the said Elizabeth River.

On November 14, 1891, a libel was filed by S. Elcoate, master of the steamship *Victory*, against the said *Plymothian*, in the District Court of the United States for the Eastern District of Virginia, for damages sustained by the *Victory* in said collision; on November 27, 1891, a libel was filed by the Canton Insurance Company, Limited, *et als.*, owners and underwriters of the cargo of cotton on board the *Plymothian*, and damaged to the extent of $71,000, against both steamships. Answers to these libels were duly filed. On December 3, 1891, the owners of the steamship *Victory* filed their petition for limited liability; and on the same day the Port of Plymouth Steamship Company, claimant of the steamship *Plymothian*, filed its petition for limited liability. The preceding libels were then merged in these two limited liability proceedings; answers and petitions were duly filed thereafter by the proper parties, and the causes proceeded to hearing. It was ascertained by the Commissioner to whom the matter of damages was referred, that, in the collision aforesaid, the steamship *Plymothian* was injured to the extent of $41,684.12, the cargo of cotton to the extent of $71,420.97, and the steamship *Victory* to the extent of $14,363.80 (all of said sums bearing interest from December 1, 1891).

The steamships in said proceedings were duly appraised and bonded, the *Victory* in the sum of $67,500 and the *Plymothian* and her earned freight (less agreed salvage) at $40,221. The above causes were heard by the District Judge in June, 1894, and in September, 1894, were decided

by him, he holding the steamship *Plymothian* without fault in the said collision and the steamship *Victory* solely at fault. On the 30th of October, 1894, the District Court entered its decree in these causes to the above effect, giving a judgment against the bond of the *Victory* in favor of the petitioner for $24,478.78, and of the cargo owners in the aggregate for $41,882.74, and interest from October 30, 1894, being their respective *pro rata* recoveries on the *Victory's* bond of $66,361.52.

From this decision the cargo underwriters and the claimants of the *Victory* appealed to the U. S. Circuit Court of Appeals for the Fourth Circuit and that Court heard argument in these causes in February, 1895, and on the 28th day of May, 1895, filed its decision affirming the District Judge in his finding as to the fault of the *Victory*, but modifying the decree in respect to the *Plymothian*, holding that she had not adopted the necessary precautions for avoiding the collision, and decreeing full recovery to the owners of her cargo, first, against the bond of the *Victory* to its entire amount, and then over against the bond of the *Plymothian* for the remaining amount due them on their entire loss. The opinions of the District Court and the Circuit Court of Appeals appear in the record filed herewith at folios 447-458 and 498-504 respectively. Rehearings were asked and denied, but the mandate was suspended until November 1, 1895, to give opportunity to make application to this Court for writs of *certiorari*, which were duly granted.

Upon the trial the following facts appeared and were in substance so found in both courts: The two steamships came into collision at 4.14 P. M. on November 12, 1891, on a clear afternoon, close upon black buoy No. 7, which marks the eastern edge of the 18-foot channel of the Elizabeth River, between Lambert's Point and Craney Island Lighthouse. The charts filed in these causes, the originals of which are before the Court, show the following courses and distances: From Lambert's Point Lighthouse to buoy 9 is 350 yards N. W. by W.; from buoy 9 to buoy 7, the place of collision, 767 yards due north; from buoy 7 to Craney Island Lighthouse, 1,200 yards N. ½ E.; width of channel at buoy 9, 450 yards; at buoy

7,475 yards; at Craney Island, 250 yards. The range of mid-channel, from a point opposite Craney Island Lighthouse to a point opposite buoy 9, is S. ½ W.; the distance about 1⅛ miles.

The steamship *Victory*, Elcoate, master, with a crew all told of 31 men, was an iron ship of 1,774 net tonnage, 338 feet long, 38½ beam, 17 feet aft, 13 feet forward, of draught, and was bound up the river to Norfolk, light, with 400 tons of water ballast and 550 tons of coal.

The *Plymothian*, Mardon, master, with a crew, all told, of 21 men, was an iron ship of 1,016 net tonnage, 260 feet long, 16 feet draft, with a cargo of 3,682 bales of cotton, and was proceeding down the river from Lambert's Point, bound to sea.

Each steamship had its captain on the bridge, with a Virginia pilot in charge of navigation. Just as the *Plymothian*, having left Lambert's Point pier, had rounded buoy 9, and had straightened out on her course down the eastern side of the channel, the *Victory*, in coming up from Hampton Roads, was just abreast of Craney Island Lighthouse. This was at 4 P. M.; the vessels were then 1⅛ miles apart, the *Victory*, which had been moving 10 miles an hour, is then alleged to have slackened her speed to some 6 or 7 miles an hour, and the *Plymothian* was moving about 4 miles an hour. The tide was flood, running about 2 miles an hour. The *Plymothian* kept well to the eastern side of the channel on a ported helm.

The weight of evidence shows the *Victory* off Craney Island to the westward of mid-channel, though her navigators claimed her to be on the eastern side. Several of the disinterested witnesses place her close over to the western edge of the channel. Upon rounding buoy 9 and straightening out on her course down the eastern side of the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port, repeating it afterwards twice. It was some time before the *Victory* answered, which she at length did with a cross-signal of two whistles, and, as admitted by her pilot, Nelson (Record, pp. 331, 340), when half-way between Craney Island and buoy No. 7.

When the *Plymothian* blew this one signal whistle the

third time, she was thus promptly answered by a cross-signal of two whistles from the *Victory*, the *Victory* having in the meantime directed her course from mid-channel to the eastern side, and the *Plymothian* being headed down the river close to the eastern edge of the channel.

The steamer *Plymothian* thereupon blew alarm signals and at once backed her engines full speed, continuing the same until the collision. The heavy preponderance of testimony shows, as found by the District Judge, that at the collison, which occurred shortly thereafter, the headway of the *Plymythian* was entirely overcome, and it is possible that she attained a slight backward movement. The *Victory* also blew alarm whistles and reversed her engines, but the headway of the *Victory* was not overcome and she ran into the *Plymothian*, striking her port side with such force as to render immediate beaching necessary.

At the time of the collision the *Plymothian's* bow was touching buoy No. 7, on the eastern edge of the channel, and in another moment she would, under her port helm, have grounded. The angle of collision was about 60 degrees.

The main allegations of the *Victory's* navigators, as shown by her pleadings, were:

(1) That the *Plymothian* on coming out from Lambert's Point pier, crossed over to the western side of the ship channel, and then recrossed to the eastern side, when the collision occurred. (2) That she had defective whistles. (3) That she failed to stop and reverse when danger of collision arose. (4) That the *Victory* herself was on the eastern side of the channel, and was prevented from taking the western side by several steamers and schooners which were in the river. On all of these charges the District Judge found strongly against her, a finding which was followed by the Circuit Court of Appeals, save as to the third charge.

The allegations of the *Plymothian* against the *Victory* were:

(1) That the *Victory* was in mid-channel at Craney Island, and failed to keep in mid-channel or on the west-

ern side, as the rules of navigation directed. (2) That she failed to answer the first signal of the *Plymothian* of one blast, for some time, and then replied by a cross-signal. (3) That she then starboarded her helm and came over to the eastern edge of the channel, down which the *Plymothian* was proceeding, thereby causing the collision. (4) That she was moving at too rapid a rate of speed, and failed to stop and reverse as the law prescribed. All of which charges were fully sustained by a large preponderance of evidence, and by the findings of both the District Court and the Circuit Court of Appeals, the latter holding her faults so gross as to be almost willful.

On behalf of the *Victory*, her master and eight of her crew were examined by deposition: the depositions of three witnesses from the S. S. *Princess* and that of a negro bargeman named Swaine, were also taken; and on the trial the pilot Nelson, a boiler-maker named Wood, a tugboat captain named Pratt, lighthouse keeper Martin, real estate agent Page and clerk Tweddle were examined.

Counsel for the *Plymothian*, examined on her behalf the master and ten of her crew by deposition, and introduced before the Court, at the trial, the pilot Henley, ten disinterested eye-witnesses of the collision, a marine surveyor and a shipwright; these disinterested eye-witnesses are tugboat and steamboat men who saw the collision from all points of the compass, whose daily lives are spent on these waters and who are thoroughly acquainted with the location of the accident.

This case, therefore, differs from the ordinary collision case in that such a large amount of disinterested testimony, from witnesses known to the Court and thoroughly conversant with these waters and the rules of navigation, has been obtained.

The evidence is most voluminous and conflicting. Such the District Court has found it to be, and counsel for the *Victory* in the lower Court, in his brief, has stated it thus strongly:

"The testimony is in hopeless conflict as to the facts of the collision, the position taken by each vessel being diametrically opposed, and a multitude of witnesses outside

of the crews of the vessels have been also examined, whose testimony is as conflicting as that of the crews themselves."

In view of the fact that, since the decisions of the lower Courts in this case, this Court has, in the case of the *Delaware* (161 U. S., 457), held that waters such as those in which this collision occurred, were not embraced within the Act of 1885, but were subject to the provisions of the United States Revised Statute, Section 4233, and to the regulations of the Supervising Inspectors, it will be necessary to go more fully into a discussion of the facts of the case than otherwise would be called for. This discussion will be first directed to the navigation of the *Victory*, whose faults have been deemed gross by both the lower Courts, and afterwards to the navigation of the *Plymothian*.

I.

The *Victory*, passing Craney Island, was not on the eastern edge of the main ship channel, but was at least in mid-channel, if not further to the westward.

Notwithstanding the statements in the log of the *Victory*, the allegations in the various pleadings filed from time to time in her behalf, and the unqualified and positive statement of those of the *Victory's* crew who gave testimony on this point, that she passed Craney Island lighthouse, on the eastern side of the channel, we contend that the great preponderance of testimony is to the contrary, showing that she passed the lighthouse certainly as far west as mid-channel, if not well over to the western edge.

Of the large crew of thirty-one men on the *Victory*, only nine are produced to give testimony on her behalf. Of these, three are from the engine-room and know nothing of what occurred on deck. Two others, Scott and Stewart, testify as to nothing occurring before the ex-

change of signals, so that only four of this large crew gave testimony on what must be considered one of the main facts in dispute.

Only Candish (R., 35-45); Gilbert (R., 61-2); Middleton (R., 101-2), and Elcoate (R., 132-141), place the *Victory* passing Craney Island on the eastern side of the channel, all stating that she was forced there by passing steamers; but two out of these four, on cross examination, show that she could not have been east of mid-channel, Candlish (R., 34), stating that the *Victory* had to starboard her helm to avoid the schooners, which were about mid-channel (see also R., 46, as to passing second steamer, and R.,47, as to passing third steamer), which is corroborated by Gilbert (R., 69), stating that the *Victory* had to starboard her helm in passing the third steamer, which was west of mid-channel. It is true Nelson, the pilot (R., 330), follows these four, but he says he took the east side, not because he was forced there, but because he knew the steamers he was meeting were going to take the Swash Channel, and he wanted to give them room.

Of the *Victory's* disinterested testimony, Wigham (R., 21), does not state positively her position at Craney Island; Page (R., 316), did not see her until she was above Craney Island; Pratt (R., 307-8), does not place her until after she passes the lighthouse, and Martin (R., 320), put her close on the eastern side. Martin was the witness who sees the *Victory* all the way from Boush's Bluff lightship (R., 320, 321), and swears she moved close upon the eastern side of the channel, all the time, *heading straight for the pier* where he was standing. An examination of the chart shows that such a course would have put her aground before she could get to Craney Island. His testimony refutes itself.

On the other hand, all but one of the crew of the *Plymothian* who testify on this point, Lyons (R., 210); Hendema (R., 228); Baird (R., 231, 236); Wood (R., 239), place the *Victory* on the *Plymothian's* port bow, and, of course, necessarily, not on the eastern side of the channel, no matter where the *Plymothian* was, whether on the east side, middle or west side. Schroder (R., 203), don't place her until after signals were given, and then as throwing over

from west to east, about ahead. Before that, of course, the necessary inference must be that she was in mid-channel or west of it.

Mardon, master (R., 264, 270), and Henley, pilot (R., 361, 363, 366, 368), place her in mid channel, as does the answer. Also Etheridge (R., 354, 358, 359); and Harrison (R., 399); and Wynne (R., 411). But Brown, the keeper of Craney Island light (R. 346, 348), and Goodwin (R., 375), place her close over on the western side of the channel, which is singularly corroborated by the testimony of Mate Channel, then on the *Olive* (R., 428, 429), and Captain Harney of the *Luray* (R., 433), who both state positively that they passed the *Victory* port to port, Channel saying that she was just as close to the west side as she ought to be—just abreast Craney Island. This is further proved by the mate's log of the *Victory*, reciting that upon blowing the two whistles to the *Plymothian*, a schooner close aboard forced them "*to keep on a starboard helm.*" If the *Victory* was within thirty or forty feet of the eastern shore in passing Craney Island, and a schooner forced her to *continue* a starboard helm, she would have been ashore long before arriving at buoy No. 7. She must have been either in mid-channel or west of it, and then have come over under a starboard helm in order, as Captain Nelson puts it, to give the *Plymothian* room, with reference to which vessel he was directing his course, as he states (R., 337-9).

The preponderance of testimony is decidedly in favor of our contention on this point, and so the District Judge decided, holding that the *Victory*, at Craney Island Light, was at mid-channel (R., 449); repeating it (R. 451).

The opinion of the Circuit Court of Appeals (R., 499), also places her about mid-channel or possibly a little to the eastward, but does not follow the pleadings of the *Victory* in placing her on the extreme eastern edge.

II.

The *Victory* was not forced to the eastern edge of the channel by passing vessels.

Recognizing the hopelessness of their case, should the *Victory* be placed in mid-channel at the first interchange of signals, the collision happening on the eastern side, her counsel attempt to transpose this steamship to the eastern edge of the channel passing Craney Island and up to the collision point, and endeavor to justify such a position by saying that she was forced there by passing vessels.

This excuse is first given in their log, and taken up and repeated time without number in their pleadings.

In attempting to prove this statement, however, an utter failure is made. Their pretense is that, commencing below Craney Island, the channel is from that point up to the collision regularly notched with vessels, each forcing the *Victory* further and further to the eastward, until finally at the collision she is right on the east bank. These vessels consist of three steamers and three schooners. The schooners may be dismissed with a word, when all of the crew testify that they were all to the eastward of mid channel, save Nelson, who states that only one was, he, the navigator, never noticing the others, which were on the western side (R., 336, 337), nor navigating with reference to *them*, but to the *Plymothian*, a glaring discrepancy; and the further remark, that an analysis will show not only that the statements of the witnesses as to the schooners are in hopeless conflict, one with the other, but show that, admitting that the *Victory* was on the east side, she could easily have passed over to the west side, either between the last steamer and the first schooner, or the first and second schooners, or between the second and third schooners.

As to the passing steamers, no disinterested witnesses testified for the *Victory*, and again only four out of a crew of thirty-one.

Candlish (R., 34, 46), states they passed the first steamer half a mile below Craney Island, the second at the light-

house, a little west of mid-channel, and the third one-third of the way to the buoy. No difficulty here in passing to the westward between the first and second or second and third steamers. Gilbert states he passed three steamers (R., 61), two before passing Craney Island and one after, starboard to starboard, which forced him on the east side (R., 68, 69), the first half a mile, the second a quarter of a mile, below, and the third just above Craney Island. No difficulty here in passing to westward.

Middleton (R., 102), contradicts all the others by placing the first steamer below Craney Island, the second steamer two lengths behind the first, off Craney Island, and the third, one length behind the second and above Craney Island. These positions, if proved, would, of course, prevent the *Victory* from going to westward; but this is the witness whose statements as to schooners are absolutely ridiculous, and these may be so taken also, inasmuch as they are so at variance with his own captain and crew.

Elcoate (R., 132, 145, 146), places the first steamer half a mile below Craney Island; the second just off, and the third a quarter of a mile above, estimates which allow the *Victory* ample moving space between the first and second and the second and third steamers. No forcing to eastward here.

Nelson, the pilot, the navigator (R. 330), frankly admits that he was not forced over by these steamers, thereby flatly and hopelessly contradicting all the preceding witnesses, including the captain, but that he went there voluntarily in order for them to take the Swash Channel.

Taking their own testimony solely, none of the witnesses prove the contention that these steamers forced the *Victory* there, and, as a matter of fact, she was not there, as is conclusively shown by Captain Harney, of the *Luray* (R., 433), and Mate Channel, of the *Olive* (R., 428) (two of these three steamers), both of whom state positively that they passed port to port.

The opinion of the District Court, as to the weight of testimony on this alleged forcing to the eastern side of the channel, is given in no uncertain language. He says (R., 450):

"The weight of testimony is that the western part of the channel, as far at least as abreast of buoy 7, was free from obstruction. The *Victory's* own witnesses place such schooners, as that steamer met after passing Craney Island, east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rules, to take the eastern side. Moreover, the claim of the *Victory's* crew that each of three steamers, which she met in coming from Hampton Roads up Elizabeth River, gave her two whistles and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers, and by all the witnesses in the case, who testified that when she had reached Craney Island she was in mid channel. The preponderance of testimony in favor of her being in this last named position is so great as to be *conclusive of the fact.*"

This finding of fact is apparently followed by the Circuit Court of Appeals, for nowhere is found in its opinion, as delivered by Judge Simonton, any expression to the effect that the *Victory's* navigation, after passing Craney Island, was hampered in the slightest degree by passing vessels, either steam or sail.

The counsel for the *Victory* will doubtless attempt to explain away the cutting effect of the testimony of Harney and Channel by saying that numerous steamers were passing down the river at the time, and while the *Luray* and *Olive* may have passed the *Victory* port to port, yet she passed three other steamers starboard to starboard.

The record does not disclose any such stream of vessels passing down the river at this hour, as is called for by this explanation.

All the witnesses, as does the log, speak of passing only three river steamers, which prove, on investigation, to be the *Louise*, *Luray* and *Olive*.

It is true that Elcoate, in his remarkable answer to the libel of the cargo owners (R., 436), filed after the depositions of himself and crew were taken, attempts to introduce a tug, an attempt entirely unjustified by all the evidence in the case, for there is not a word of testimony in this large record to sustain this allegation. In this same answer Elcoate also introduces the steamer *Accomac*, which

he had not mentioned in his testimony then taken, and which is spoken of by only one witness of the many examined, seaman Gilbert (R., 74), who thinks that one of the steamers, which one he does not know, was named *Accomac*. This single reference is insufficient to overcome the effect of the testimony of Channel and Harney; it is most damaging to the *Victory*, not only on this point, but also on her position in the river at Craney Island, for, how ever many other steamers she may have passed, when she passed the *Luray* and *Olive* she was at least in mid-channel, if not to the westward. Placing her there, the whole theory of her case as shown by her pleadings, the whole fabric of her defense, falls. She was not on the eastern edge of the channel at Craney Island; she had not then been, nor was she afterward, forced there by other vessels. Her position was undoubtedly that described by the District Judge, who says (R., 451):

"I consider it proved beyond reasonable doubt that the *Victory* and *Plymothian*, at 4 P. M. on the afternoon under consideration, one of them in mid-channel abreast of Craney Island Light, and the other in mid-channel abreast of buoy 9, were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction or let or hindrance of any kind."

III.

The *Victory* being in mid-channel, if not to the westward, at Craney Island, and the *Plymothian* in mid-channel, or to the eastward, off buoy 9, each should have ported and passed port to port.

The charts show the channel line from Craney Island to buoy 9 to be straight, the range being about N. ½ E. and S. ½ W.; and the distance about a mile and an eighth.

It will be conclusively shown, in our subsequent discussion, that the *Plymothian*, coming out from Lambert's

Point, was never further to westward than mid-channel, and was off buoy 9 about the time that the *Victory* was below Craney Island.

Such being the situation, it is submitted that it was the duty of each vessel to follow the natural law and keep to the right.

It being conceded that Rule 21 of the Act of 1885 is not applicable, it is no less strongly urged here, as it has been in the two lower courts, that both under the local custom of the river, and under Section 4233 and the pilot rules, it was the duty of these vessels to sound one whistle and pass port to port.

The fact that it is an established custom, and was recognized as such by the navigators of the *Victory* on this occasion, may not be an unimportant element in the case at bar.

Mardon, the master of the *Plymothian*, says that in navigating narrow waters "ships coming up go one way and going down they keep the other. The *Victory* was on the east side when she should have been on the west" (R., 268). "From the time she got under way in Hampton Roads, up to Lambert's Point, she should have kept on the west side of the channel" (R., 268; see also R., 277, 278, 280; Henley, R., 372; Tweddle, R., 325, 326), which custom was known to Elcoate, the master of the *Victory*, as a rule (R., 162).

The river steamers appear upon the proofs, though contrary to the contention of the *Victory*, to have obeyed this custom and passed the *Victory* port to port, going down the starboard side of the channel, though not bound, by their light draft, to the channel limits; and the schooners, also, in obedience to this custom, were holding to the starboard side of the channel; and such, indeed, was the understanding of the counsel who prepared the *Victory's* pleading, and examined her crew and navigators, as clearly disclosed in the pleadings and proofs. Indeed, the strongest proof that the *Victory* was wrong in taking to the eastern side of the channel is found in the excuses which he immediately began to offer for being on that side. In her log, supposed to be written the night of the collision, she begins her defense on this point. In all of her plead-

ings she states she proceeded on the eastern side of the main ship channel, in order to avoid certain vessels which were seen approaching (R., 1, 19, 436).

In her proofs, the most elaborate justification is attempted, which we have shown to have signally failed, and finally her master admits expressly that, where practicable, it was his duty to go to the right (R., 152).

However the local custom, and whatever its bearing on this case, we earnestly submit that the vessels being in the situation above described, it was the duty of each, under the statute, to blow one whistle, port the helm and pass port to port.

The chart shows the channel between Craney Island and buoy 9 to be straight, for vessels of the draft of the *Victory* and *Plymothian*. Reference may be had by counsel for *Victory* to a chart filed by the District Judge, in which is shown a dotted line giving the course a vessel should steer coming into Norfolk Harbor, starting from mid-channel at Craney Island and gradually approaching the eastern edge at buoy 9. The navigation of the river is now no more regulated by a dotted line drawn by an engineer on a government chart than by the International Rules; nor is that chart intended exclusively for *incoming* vessels. Outgoing steamers have some rights in the river, and such a line must be disregarded whenever other vessels come within signal distance and the regular rules of navigation become operative. For what purpose the learned Judge filed this chart does not appear. Certain it is, however, that he introduced it for no such purpose as this; and equally certain is it that the Government contemplated no such use, for they have abolished that issue of the Norfolk Harbor Chart, and their official issues no longer contain such lines.

The channel being straight, and each vessel being in mid-channel, a situation the least favorable under the evidence for the *Plymothian*, it is submitted that their navigation should have been controlled by Rule 18 of Navigation, which reads:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

This rule is enlarged and explained by Supervising Inspector Rule No. 1 (R. 344) and by situation One; the vessels being head on, or nearly so, should have sounded one whistle, ported and passed port to port. This the *Plymothian* attempted to do, as we shall presently show, and the failure of the *Victory* to respond to her signal, her finally giving a cross-signal and starboarding, was the proximate cause of the collision which promptly ensued.

It is contended that Starboard Hand Rule No. 19 should apply, because the *Victory*, moving up the river from Boush's Bluff, was on the starboard side of the *Plymothian*, lying at Lambert's Point pier, and moving thence out into the river at buoy 9.

We cannot suppose that serious attention will be paid to such a position; as well contend that the *Victory* at anchor in Hampton Roads at 3.30 was on the starboad side of the *Plymothian*, coaling at Lambert's Point pier.

The *Velocity*, 3 P. C., 44.

The *Ranger* and the *Cologne*, 4 P. C., 519.

The rules regulating the navigation of these vessels meeting each other cannot have applied earlier than when the incoming vessel reached Craney Island and the other passed buoy 9; they were then at least a mile apart, and for the first time assumed rights and obligations with respect to each other.

Taking the most unfavorable position to the *Plymothian*, they were in mid-channel, head on, and directly in the first situation.

An inspection of the testimony will establish, however, as we shall presently show, that while the *Victory* was in mid-channel at Craney Island, if not to the westward, the *Plymothian* was straightened down the river near buoy 9 and well over on the eastern side. The steamers were, therefore, on each other's port bow, and in the third situation of the pilot rules (R., 432).

Whether in the first or the third situation, the obligation to blow one whistle and port the helm was no less imperative, and the flagrant disregard of this obligation on the part of the *Victory* caused the collision.

While the lower courts have laid some stress on the operation of the International Rules, the facts as found by

both courts clearly bring the vessels within the foregoing pilot rules; they control with no less force and effect than the International Rules, were they operative, and their disregard has been attended with no less unfortunate result.

IV.

The *Victory* did not give the first signal, but the *Plymothian* did, which was not answered by the *Victory* until twice repeated, and then by a cross-signal.

It is practically a conceded fact that when the *Plymothian* was passing buoy No. 9 the *Victory* was not further up the river than Craney Island Lighthouse.

Bearing this in mind, the fact of the first signal being sounded by the *Plymothian*, and not by the *Victory*, stands apparent, even on their own testimony. Of the nine witnesses who testify from the crew of the *Victory*, Stewart and Scott do not testify as to this point, nor do the three witnesses from the engine-room. Candlish places this signal when passing the first schooner (R., 48), and some distance south of Craney Island So does Gilbert (R., 71), and Middleton (R., 103); and Elcoate (R., 135); when only five lengths from buoy 7, and off the first schooner (R., 147), only 500 yards north of buoy No. 7, and 700 yards south of Craney Island.

Nelson (R., 331), 340, places the *Victory* half way between Craney Island and buoy 7 when her first signals were given.

Of their disinterested testimony, neither Swain, Pratt, Page, Martin nor Tweddle speak at all on this point.

Wigham (R., 21), places the *Plymothian* well past buoy 9 when the *Victory* sounded her two whistles. South (R., 29), places the *Victory* only four or five cables' length from buoy 7, and Rankin (R., 31), places her only a quarter of a mile from the *Princess* at this time. It cannot be doubted, then, that she was more than half way between the light-

house and buoy 7 when her first signals were given, and from their own testimony.

On this question we produce not only all of our deck testimony, with positive statements, giving locality, but numerous witnesses from every quarter, who hear all the *Victory's* whistles, yet place them after ours.

Schroder (R., 202); Hendema (R., 229); Baird (R., 231); Wood (R., 238); Captain Mardon (R., 264), and Henley (R., 360), 361, all state that their first signal of one whistle was given just after passing buoy 9, when the *Victory* was certainly not above Craney Island.

The disinterested witnesses, Etheridge (R., 353); Goodwin (R., 373); Clark (R., 388, 390); J. M. Clark (R., 400); Wynne (R., 404), and Pebworth (R., 424); all substantiate our testimony on this point, stating that the *Plymothian* sounded the first signal upon passing buoy 9; that it was loud and clear; that they heard it before any signals from the *Victory*. All the foregoing witnesses place the *Plymothian* at buoy 9 when giving her first signal, and then it is conceded that the *Victory* was not nearer than Craney Island. Her own crew place her much above Craney Island; some, indeed, half way between there and buoy 7, when she sounded her first whistles. How, then, could her whistles have been given first?

It is a fact proved beyond question that they were not, but that the *Plymothian* gave the first signal, and so the District Court held in this language:

"After rounding buoy 9, and straightening out on her course down the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. *It was some time before the Victory answered*, which she at length did with a cross-signal of two whistles. Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was half way between Craney Island Light and buoy 7."

And so held the Circuit Court of Appeals (R., 503).

V.

The *Victory* was under excessive speed, and did not promptly stop and reverse.

It is apparent, from the testimony of her master and pilot, alone, that the *Victory* did not stop and reverse when the law required her so to do, independent of the physical proof in the case, that at collision her headway was sufficient to penetrate fifteen inches of solid iron or steel.

Her fault is chiefly attributable to the dual command of master and pilot, and the absence of an efficient lookout.

Elcoate (R., 129) states that he was master-in-charge of the *Victory*, on the bridge (R., 124) stationed on the bridge in command, on the lookout, reporting to the pilot, who was specially directing the navigation, *under him*, yet *to whom* he reported the vessels that came in sight and the signals they gave (R., 134, 135, 147). Who was in command?

Nelson (R., 329) states he *supposes* Elcoate was in command of the ship, though he was directing its navigation, and denies that Elcoate reported to him as lookout.

At R., 342, in speaking of the whistles, he says he got Elcoate to look out for them—("I was busy"). And yet Elcoate makes no report of them to him; makes no mention of steam from the *Plymothian's* whistle, and states he didn't know she was blowing at all. He denies the elaborate conversation set out by Elcoate in his testimony, and in his pleadings (Answer to Ralli Bros.' Libel, R., 438, 439), and states (R., 342, 344) that no such conversation occurred.

At the most critical moment, Elcoate and Nelson are absolutely at variance as to the whistles below the pier, Elcoate (R., 141, 142), stating that nothing but one locomotive was blowing, corroborated by Gilbert (R., 68), and that he saw steam from the *Plymothian*, while Nelson (R., 332, 340, 342) states there were several blowing; he could not make them out, and got Elcoate to attend to this.

Their whole case here turns on their attack on the *Plymothian* whistles, an attack which has utterly failed, the preponderance of testimony, as shown herein later, being overwhelming, and entirely convincing to the mind of the District Judge, and seemingly also to the Circuit Appellate Court.

Such the master, lookout and pilot of the *Victory*. The result is not to be wondered at.

Though a great many witnesses prove without doubt that the *Plymothian* sounded at least two single blasts of her whistle, and the danger signal, loud, clear and distinct, neither the master nor the pilot hear anything from her, and see only two puffs of steam (one of them conveying a little sound to Elcoate).

Elcoate admits (R., 144) that he took these puffs to be two separate signals of one blast each, and that the *Plymothian* was going to eastward, yet Nelson (R., 342) says he did not so report them, though stationed there for that purpose. He took them for one signal of two blasts. The pleadings state that it was uncertain what they were. Under all rules, whether pilot, or international, or what, it was the *Victory's* duty at once to stop and reverse. Elcoate (R., 134) states that the *Plymothian* was porting her helm even before blowing his first signals; yet he blows her two whistles, sees steam from her, sees steam again fifteen seconds later, then blows his second two whistles, and only after that a minute or two (Candlish, R., 51, 56), blows his danger signals and reverses. Elcoate (R., 135, 136) admits that half a minute elapsed after the second signal before reversing.

Can the Court permit a master, seeing, according to his own statement, an approaching vessel altering her course so as to involve risk of collision, to signal her merely—not altering his speed, to wait passively to hear her repeat cross signals twice, to again signal as at first, and then wait half a minute before reversing until so late that at collision his vessel's speed is so great as to penetrate fifteen inches of metal, especially in view of the contradictory statements of these navigators, their misstatements of their own course and the course of the other vessel, and their false attacks on her whistles.

Her fault in continuing her unlawful course, when she should have reversed, is conclusive out of the mouths of her own master and pilot.

The Victory's Speed.

Her own deck testimony places the *Victory's* speed at, and after passing, Craney Island lighthouse, at from four to five and a half knots, save Nelson, who says her engines were barely turning over (R. 333, 338, 339). This is attempted to be substantiated by testimony from the engine-room to the effect that at 4.05 the engines were slowed down to half speed. This curious fact, which always appears in these collision cases, that a vessel runs at full speed until about five or ten minutes before a collision happens, of course, comes up here; but singularly enough, is not shown by the official records upon which it should show—neither the deck log nor the engineer's log record this slowing down at Craney Island, though written up after the collision, when it was known that every important movement of the *Victory* would come under a court investigation. Their disinterested testimony is strangely silent, while the testimony of the *Plymothian* gives her considerable speed.

The testimony of six witnesses from the *Victory's* deck is positive and unequivocal that the *Victory* had *sternway* on her at collision, save one, Stewart (R., 121, 122, 128), who states that, though she was moving backwards through the water, she was making headway over the ground. Candlish (R., 39), Gilbert (R., 65), Middleton (R., 97), Scott (R., 110), Elcoate (R., 141, 150), all so state, and further emphasize this statement by swearing that the *Plymothian* came into the *Victory*, moving backwards, at great speed, four or five knots, falling with her side upon the *Victory's* bow, some stating that her speed was undiminished and her engines not reversed until a foot off.

Candlish (R., 41, 42), Middleton (R., 96, 98), Scott (R., 109, 110), Stewart (R., 119), Elcoate, (R., 140).

Their disinterested testimony is not so strong.

South (R., 27, 28) thinks that she had sternway by her back-wash (which, by the way, is the manner in which

her crew judge of her backward movement). Rankin (R., 31) says he should think she had sternway, as she did not seem to have much headway at first; Swain, Page and Martin can't judge; Pratt (R., 311) states merely she had slowed down, but Wigham (R., 22) says engines were backing but ship was not; thinks she was moving forward; and Tweddle (R., 382) thinks engines were stopped, but the headway of vessel most decidedly was not stopped; while Nelson (R., 333) states the same thing, that otherwise the collision could not have happened. Speaks of *his* striking the *Plymothian* (R., 336), and states (R., 338, 342) that there was no tide that day, and if there was, that it would not alter the situation, as both ships were in the water.

The *Victory's* log (R., 165) gives a flat contradiction to her own crew in their reckless statements here, by the admission that the *Victory* at collision "was making little if any headway through the *water*." Counsel conceded, at the trial in the lower court, the tide to have been flood, running from two to two and a half knots at the time, and at the trial admits what the log has recorded. This admission in the log and by counsel make the deck witnesses of the *Victory* to be so reckless in their statements that the Court can scarcely rely on their statements in other respects.

The statements of the witnesses for the *Plymothian* conclusively show that the *Victory* was making decided headway at collision, and that the *Plymothian* was at least with speed fully checked. Lyons (R., 211), Baird (R., 232), Wood (R., 240), Schroder (203), Mardon (R., 266), Ham (R., 186), Henley (R., 362), all state positively that at the collision the *Victory* came into the *Plymothian's* side at a three to five knot speed, and that the headway of the *Plymothian* was fully checked; some, Ham R., 193), Wood (R., 239), Henley (R., 362), stating that she was possibly making sternway.

On this point the numerous disinterested witnesses strongly corroborate the statements of the *Plymothian's* crew.

Brown (R., 346) states the *Victory's* speed at Craney Island Lighthouse to be 12 knots, and notwithstanding

the severe attack of *Victory's* counsel, is corroborated by his own brag witness, Pratt (R., 309); Brown (R., 346) states her engines were reversed a short time before the collision. Pebworth (R., 424) puts her at full speed passing the *Virginia Dare* and then she slowed down. Wynne R., 405) states the *Victory* was moving rapidly with a flood tide, and her headway was not checked until the collision, being positive that she was making headway at the collision, estimating her speed before that 8 or 10 miles an hour (R., 406.) Etheridge (R., 354 to 357) estimates her speed at 10 to 12 miles an hour and at collision at 5 miles. Goodwin puts her speed at 10 miles an hour before collision (R., 375) and Clark (R., 402) don't suppose she had much headway at collision.

These witnesses state positively that the *Plymothian* had little or no headway at the collision. Etheridge (R., 355) gives her sternway. Goodwin (R., 374, 375) no headway, entirely checked, stopped altogether. Clark (R., 388) don't think the *Plymothian* was going ahead but very little, if any. Wynne (R., 405) gives her headway as checked, while all the disinterested witnesses of the *Victory* are strangely silent as to the *Plymothian's* speed at the collision.

The weight of testimony is vastly in our favor here, especially when it is seen that the physical facts all prove the *Victory* to have been the moving vessel, and not the *Plymothian*. An examination of the photographs shows that; nor has the fact of a piece of plate being found in the *Victory's* bow any weight to show the contrary, in the light of the testimony of Captain Sanford and Mr. Quigley. The motion of the *Victory* could have caused that as well as that of the *Plymothian*, and did cause it—striking at that angle. A two to two and a half knot motion on her part is admited, a greater is proved; while the proof shows our headway fully checked.

The foregoing testimony demonstrates that the *Victory* had considerable headway on her at the moment of collision while the headway of the *Plymothian* was entirely checked, if she was not moving backwards. Thus

the District Court has held in the following language (R., 451):

"The headway of the *Plymothian* was overcome, and it is possible she obtained a slight backward movement. The headway of the *Victory* was not overcome, and she ran into the *Plymothian's* broadside, with such force as to drive 15 inches into her side and to render immediate beaching necessary. She penetrated 15 inches into the *Plymothian*, notwithstanding the fact that the angle of incidence with that ship was 60 or 70 degrees."

That the *Victory* was the striking vessel, and that the allegations in the pleadings, repeated in the testimony of several of the *Victory's* crew, to the effect that she was making sternway in the water, when the *Plymothian*, moving rapidly, fell sideways against the tide upon her bow, was not true, is thoroughly established by the great weight of testimony; this is shown by the preceding citation from the opinion of the District Judge, and is demonstrated by the express admission of Pilot Nelson (R., 333), who says: "Of course, she (*Victory*) would have to be moving ahead to strike the ship, * * * she had to do that to strike the ship."

We cannot well conclude our discussion of the navigation of the *Victory* and the testimony of her crew without directing the Court's attention to the answer filed by Captain Elcoate to the cargo owners' libel, and to the numerous and important contradictions in the testimony of the Master and the Pilot of the *Victory*.

Answer to Ralli Brothers' Libel, R., 436, 439.

The remarkable document filed under oath, by Captain Elcoate, after the testimony of the *Princess* and his own crew and his own testimony had been given and he had left the witness stand, is called to the attention of the Court for its manifestly reckless statements, especially as regards the whistle of the *Plymothian*, and her being on the west side of the river and the *Victory* being on the east side of the river. He places the *Plymothian* in this

answer (R., 437), when first sighted, 340 feet from the red buoy, yet on page 148 of his cross-examination, he distinctly says he could not tell how near to that buoy she was. It contradicts not only many of the statements of his own witnesses and his pilot, given afterwards, but is self-contradictory. It places the *Plymothian* at one time only two points on the starboard bow and twice afterwards four points on the starboard bow. It sets out, in detail, conversations with his pilot, which his pilot absolutely denied; it brings in, for the first and only time in this long record, the mention of a tug as interfering with the navigation of the *Victory*, between buoy 7 and Craney Island, a vessel which is not mentioned by any of his crew or his disinterested testimony, or the *Plymothian's* crew or her disinterested testimony, nor by him when on cross-examination; he states unqualifiedly and unreservedly, that the *Victory* was moving backward through the water and perhaps over the ground, contrary to the statement of Pilot Nelson under oath, and contrary to the concession of his own counsel at the trial.

In view of the testimony, which is now before the Court, this is indeed a most remarkable document, and shows either that Captain Elcoate made deliberately false statements, or was so absolutely reckless and inaccurate in his calculations as to make his testimony unreliable.

Contradictions of *Victory's* master and pilot.

The master and pilot of the *Victory*, the two navigators of the *Victory*, are in such hopeless conflict as to almost every important fact connected with this collision that their testimony can be considered of but little weight.

Taking the *Victory* from the time she started from Hampton Roads up to the time she sunk the *Plymothian* in violent collision, there is scarcely a single fact upon which they agree.

As to the command of the vessel, neither seems to know which was master, Elcoate (R., 129) stating he was master in charge of the bridge in command, on lookout, and *reporting to the pilot* (R , 134), while Nelson says (R., 329) he supposes the captain was in command.

As to her speed to Craney Island, Elcoate (R., 131) says the *Victory* left Hampton Roads at 3.30 and came up to Craney Island at full speed, about 9 or 10 knots, while Nelson says (R., 329) that she left about 3 P. M. and came up at about 5 knots (R., 334).

As to passing the English steamer, Elcoate (R., 131) says she gave the *Victory* two whistles and passed starboard to starboard, while Nelson (R., 330) don't remember signals (R., 335); no signals were exchanged but they passed starboard to starboard, though the *Victory*, prior thereto, had been keeping on the west side (Elcoate saying, R., 145, they were in mid-channel), thus voluntarily adopting for her a wrong course even this far down.

As to passing river steamers, Elcoate (R., 151) states that the *Victory* was in mid-channel when she met the steamers; that they gave her two whistles and forced the *Victory* to go to the east, while Nelson (R., 330) says it was a voluntary act; that he saw the steamers and took the eastern side because he knew they were going to take the Swash Channel and he wanted to give them room.

As to passing the schooners, Elcoate (R., 132 3) places them all east of mid-channel in going down the river, while Nelson (R., 337) mentions only one schooner on the eastern side, placing the other schooners on the western side, and that single schooner was going up the river drifting with the tide.

As to taking to the eastern side, Elcoate states they were forced there, as does the log (a fact entirely disproved), while Nelson (R., 334-6) goes there, not because he was forced, but to avoid the *Plymothian*, with reference to which he was directing his navigation.

As to first sight of the *Plymothian*, Elcoate, though on the lookout, as he says, don't see her until she is 200 yards west of buoy 9 (R., 157), while Nelson (R., 338) sees her coming out of slip at Lambert's Point.

As to whistles around Lambert's Point, Elcoate (R., 141) states that there were no whistles or sounds from vessels or anything from pier, save one locomotive, while Nelson (R., 340) states there were several whistles blowing at the time (R., 342); he couldn't distinguish them, so he asked Elcoate to keep a lookout for whistles; he was busy.

As to *Plymothian's* own whistles, they also differ, El-

coate seeing two puffs of steam 15 seconds apart, which at one time he takes to be two separate whistles of one blast (R., 154), though later he understands them as one signal of two blasts, while Nelson sees steam (R., 342-3), but hears no sound, and is entirely unable to tell whether it was one or two whistles, and he didn't know she was blowing at all.

Elcoate's testimony is full of alleged conversations between himself and the pilot, as to the whistles and the *Plymothian* porting (R., 134, 153), being repeated in detail in the answer to Ralli Bros. (Libel, p. 438-9), all of which conversations Nelson (R., 343) denies, saying (R., 344) that they never occurred, for he would have remembered them.

As to courses and speed of *Plymothian*, they are equally as much at variance. Elcoate places her well over on the western side of the channel repeatedly, giving the distance from the red buoy in feet and inches, while Nelson (R., 331) first speaks of her straightening down the middle of the channel, though is led to place her on the western side; on cross examination (R., 341) he again places her in mid-channel or a little to west side, where she hangs for one or two minutes (R., 342). Elcoate estimates *Plymothian's* speed at three to four knots (R., 140), and being little diminished at collision, while Nelson (R., 339), the navigator, didn't notice the speed of this vessel at all and cannot form any idea, to save his life, as to how fast she was moving at the time—a fine navigator, indeed! Although it is conceded that there was a flood tide at the time, which Elcoate says (R., 137) had much effect in canting the *Victory's* head to port (R., 150), about two points, Nelson (R., 335, 338) says the tide was about slack, that there was very little tide any way in the channel, and (R., 342), it would not have any effect any way, as both ships were in the water. As to steering rules, Elcoate (R., 152), is acquainted with starboard hand rule in narrow channels, but Nelson (R., 339), above Craney Island, runs by judgment altogether, and always makes it a rule when he sees a ship coming, to give him all the room he can, to keep out of the way, yet (R., 337), don't steer a regular course, but makes the best cut he can, having to use judgment about things of that sort.

Nor do they even agree as to the *Victory's* headway at collision, Elcoate (R., 141), stating that the *Victory* was going astern, while Nelson (R., 333), entirely negatives this statement by saying that she had headway on, and had to have it in order to strike the *Plymothian*.

And Elcoate caps the climax by swearing, against the testimony of every other witness in the case, and all the physical facts, that the *Plymothian* fell on him with such force that she passed entirely across his vessel, her stern clearing his bow.

Can counsel point to one single fact as to which these two navigators are in accord? He will attempt an explanation of the gross discrepancies, by pleading old age and lapse of memory for Nelson, but the vigorous man on the witness stand would himself scorn such a plea and indeed has already said (R., 344), that he recollects all the facts connected with this case.

His testimony alone has lost his case, as his obstinacy and ignorance in steering not by rule but by judgment caused the collision.

The foregoing discussion of the evidence shows the vast weight to be:

(*a.*) That the *Victory* did not pass Craney Island close on the east side of the channel, but certainly in mid-channel, if not on the west side ;

(*b.*) That had she so passed the lighthouse and moved on the east side, such position in spite of her insistence to that effect, was not forced on her, but, as her pilot swears, was entirely voluntary, was a serious fault, and directly contributed to the collision ;

(*c.*) That this was merely an attempt to antedate her moving to the east side, which was done when she was more than half way between the lighthouse and buoy 7, and in face of her legal obligation to be and remain on the west side ;

(*d.*) That she did not sound the first signal ;

(*e.*) That she did not respond promptly to the *Plymothian's* signal, and when she did, gave a cross-signal;

(*f.*) That she had confusion in the command of her vessel and an inefficient lookout;

(*g.*) That she did not promptly stop and reverse;

(*h.*) That her speed was too rapid, and that she was the striking vessel, bringing about the collision by her movement under starboard helm, as admitted in her log.

Every allegation of fact made by the *Plymothian* against the navigation of the *Victory* has thus been proved by a great weight of testimony; each individual fact thus alleged has been passed upon by a judge of twenty years' experience, before whom the two pilots, the navigators of their respective vessels, and all but four of the disinterested witnesses, have been examined, and each fact found in our favor.

This finding of the District Court has been fully concurred in by the Circuit Court of Appeals, which, in its opinion (R., 503), uses this language:

"The Judge who has heard the case, and with his usual care and ability, examined and weighed the testimony, came to the conclusion that the *Victory* was grossly in fault, so much so as to be the sole cause of the disaster. Whilst not going to this length with him, this Court fully concurs in his conclusion that the *Victory* was grossly in fault. * * * The course of the *Victory* seems almost willful."

In the face of these findings by the lower Court, the foregoing facts must be regarded as established. Being so established, the fault of the *Victory* is as gross as if the International Rules were to apply. The vessels were end on, if not on each other's port bow, and it was the duty of the *Victory*, after passing Craney Island, to have answered the one whistle of the *Plymothian* with one whistle, to have put her helm to port, and remained in mid-channel or have gone to the westward.

It was her flagrant violation of this duty and her obstinate perseverance in such violation, failing, at the same

time, to take the other precautions for avoiding collisions enjoined on her by law, that caused the collision and the heavy damages ensuing therefrom.

The Navigation of the *Plymothian*

VI.

The *Plymothian* did not cross over to the western side of the channel, but moved down the eastern side of the channel under a port helm, her proper course.

The entire case of the *Victory* turns on their two main charges. First, that the *Plymothian* was on the west side of the river and recrossed to the east, and, second, that her whistles were defective.

As to the first, the burden of their song is our being on the west side, making the second situation under the Inspector's rules.

Let us examine their testimony on this point.

Candlish sees her when the *Victory's* second signals are sounded, and then in the west side of the channel three and a half points on his starboard bow, moving under port helm (R., 70). Gilbert (R., 63), sees her off Lambert's Point on west side, heading down the channel three-quarters of a mile off. Middleton (R. 95), sees her half a mile or more off on the west side and four points on his starboard bow. Scott (R. 107-8), sees her on the opposite side of the river after his first signal. Stewart (R. 232), don't see her until she is 450 yards off, four points on the starboard bow. Elcoate (R. 134), sees her three-quarters of a mile off, heading to the north on the west side of the channel near the red buoy.

Such are the sworn statements of their crew and of their numerous pleadings.

Of their other witnesses, Wigham (R. 21), puts her on the starboard side of the *Victory*, 720 feet from the *Princess*, lying near mid-channel off Lambert's Point. South (R. 26), says she passed his ship, which was on the west

side of river, but don't place her there, and Rankin (R. 31), only places her on west side of channel—but he places her 300 yards from the *Princess.**

Of their other witnesses on this point,

Swain (R. 303) places her west of mid channel, 100 feet only (but his mistake of 300 feet as to the Merrimac buoy would place her east of mid-channel, if corrected).

Pratt (R. 306) places her within 200 feet of Merrimac buoy, where she would have run over the *Storm King* and *Commodore*. Page (R. 314) places her on the west side, but he knows nothing about buoys or channels, and his testimony on this point cannot be considered. Martin (R. 323) places her in mid-channel only, possibly a little to the westward, and Tweddle don't see her until the moment of collision.

Taking the above testimony alone, an analysis will show that only one or two witnesses positively place the *Plymothian* on the west side.

The crew of the *Victory* all place the *Plymothian with reference to their own vessel*, and that at a time when we charge they were *crossing from west to east*. A bearing from the *Victory*, when heading up channel, that would place the *Plymothian* on the west side, would, if the *Victory* was moving across the channel, place the *Plymothian* in mid-channel; and that she was heading across channel after sounding her second signals is shown by the testimony of her crew, Nelson and the captain and Martin and Page, when they say the *Victory* was heading directly for the end of the coal pier. If she was, at or after passing Craney Island, in mid-channel, or was west

* In this connection, the attention of the Court is directed to the admissibility of this evidence. It will be seen (R., 20, 21), that reasonable notice was not given; that the written notice required by the statute was not served, nor the depositions properly filed. Counsel, it is true, appeared; but exceptions were then and there noted, and subject to those exceptions the witnesses were cross examined.

These witnesses are the only ones on either side whose integrity has been attacked; hence, technical objections have been insisted upon in both lower courts.

While no specific ruling has been made on the admissibility of this evidence, no weight has been attached to it by either court. Everything testified to by these three witnesses has been disbelieved.

The testimony should not be considered.

of it, such heading would throw her across channel, and then this starboard bearing of the *Plymothian* to the *Victory* would be easily explained, and a gross conflict of evidence (on any other theory) would be reconciled. Such was the *Victory's* course, and such the explanation of her crew's testimony unless their counsel chooses to make them deliberate falsifiers

So with the *Princess* testimony. They place the *Plymothian* relatively from their vessel, and an inspection of the chart will show their estimates to place the *Plymothian* east of the mid-channel.

Pratt and Elcoate only are left, worthy associates, one sinking necessarily two vessels in his estimate, and the other contradicting his own pilot, for Nelson (R., 342), in spite of the pleadings, his crew and captain, places the *Plymothian* only in mid-channel, another variance with Elcoate as to a most material point.

Their testimony, therefore, places the *Plymothian* no farther to the westward than mid-channel; not a case of the second situation even here.

The witnesses for the *Plymothian* entirely controvert even this contention by the most conclusive testimony.

Take the *Plymothian* (*a*) in passing buoy 9, (*b*) proceeding down to point of collision, which is conceded to be on the eastern edge of the ship-channel.

(*a*) *In passing buoy No. 9.*

Of our deck testimony: Schroder (R., 202), Lyons (R., 209), Hendema (R., 220), Baird (R., 231), Wood (R., 238), Mardon (R., 263), and Henley (R., 360), all testify that the *Plymothian* passed the black buoy No. 9 close aboard, their estimates varying from a few feet to a few yards. The disinterested testimony of Etheridge (R., 353), Goodwin (R., 373), John Clark (R., 388), Harrison (R., 395), Joe Clark (R., 401), Channel (R., 431), who were all within a few yards of the *Plymothian* as she passed this buoy, absolutely clinch the proof on this point, independent of the much abused and alleged far sighted Wynne, who makes the same statement (R., 404), which is further borne out by the *Victory's* boss witness of color, Swaim (R., 296).

Nor is this contradicted in any way by any of the opposing testimony, not even of the *Princess*. It may be taken as a demonstrated fact, in the light of all this testimony, that however the *Plymothian* may have moved after passing buoy 9, when she passed that buoy she was within a few feet or a few yards of it, and on the eastern edge of the channel.

What, then, becomes of the earnest contention of *Victory's* counsel that it was impossible for her to have turned short round buoy 9, that the tide must have taken control of her and swept her over to the west side of the channel?

It is in evidence that so quickly did the *Plymothian* obey her port helm that her engine had to be stopped to keep her stern from striking the pier. It is well known that a tide will have more effect on a loaded vessel's stern than her bow, especially, as in this case, when her rudder is against the tide and offering a salient point of resistance. This flood tide aided rather than impeded, therefore, this movement of straightening down the channel and turning buoy 9, and it was entirely possible for the ship in moving the 350 yards from the pier to buoy 9, to have swung around the buoy and been practically straight in the channel immediately upon passing it, as we contend (John Clark, R., 392).

Thus it is demonstrated, beyond dispute, by numerous witnesses within a few feet of this vessel passing this buoy, and on all sides of her, and whose integrity is beyond question, that she did pass this buoy within a few feet, as we maintain.

Right here we are again met by the contention that in coming out from the pier into the river, we had the *Victory* on our starboard bow, and hence the *Victory* had the right of way and we should have avoided her. His pilot, Nelson, does not so contend and did not navigate his vessel under any such theory; for if he had the right of way, then under the rule he *should have held his course* and let us avoid him; yet his testimony is replete with statements of his numerous attempts to avoid us. On pages 331-2, he says: "Q. You saw her in the western side of the chan-" nel? A. Yes, sir. Q. And your vessel was on the east-

"ern side? A. Yes, sir; I went on that side to give him "room; I saw him coming out" (R., 334), "I kept on that "side to keep out of her way."

And on page 336:

"I saw the ship coming out and coming down and that was the only way to run; I wouldn't attempt to go to the west and just bother him."

And on page 51:

"I didn't want to run into her, because I saw the ship coming down on the western side, and of course *I went to* the eastern side to give her room to go down to the west. I wanted to give her all the room I could" (R., 337). "I was giving the *Plymothian* channel to go down to the westward of me. * * * There was plenty of water for me, and I *ran over* to give the *Plymothian* room to come down the west of the middle of the channel" (R., 339), "to give her room to go down *mid-channel*; that's why it was done, for I always make it a rule, if I see a ship coming, to give him all the room I can; to keep out of the way."

Do not these citations show clearly that our contention of her coming from the west to the east after seeing us is true, as the log inferentially show also, a contention which also reconciles, in a remarkable degree, the testimony of the *Victory's* crew placing the *Plymothian* on the western side relatively to their boat (two to four points on her starboard bow), when, by putting her under starboard helm across the channel, heading for the pier, the *Plymothian* would be, by their statement, on the eastern side of the channel, as these numerous disinterested witnesses conclusively prove?

We have already shown that the starboard hand rule (No. 19) cannot apply to a vessel at a pier nor moving out into the channel unless the other vessel is within signaling distance. This signal distance is little more than half a mile, as is seen by referring to Pilot Rule No. 3 (R., 431), and certainly cannot be more than a mile, which was less than the distance between the *Plymothian*, straightened down the channel at buoy 9, and the *Victory* below Craney Island.

The language of Rule No. 19 of itself makes this apparent, for, in its first clause, it applies only to "two ships under steam crossing so as to involve risk of collision."

Counsel is therefore precluded from making this contention, not only by the foregoing testimony of Nelson, but by the action of the navigators of the *Victory*, for they did not consider the *Plymothian* within signaling distance until the *Victory* was more than half way down from Craney Island and within 500 yards of buoy 7, a point of time at which the proof conclusively establishes the *Plymothian* as being well over to the eastern side of the channel.

(b.) How did the Plymothian proceed from buoy 9 to point of collision?

We have already seen that a close examination of the testimony for the *Victory* does not place the *Plymothian* more than in mid-channel, which is the estimate of their leading witnesses, Martin and Nelson. The former is followed in this estimate by John Clark, who was standing on the pier alongside of him, but an examination of the chart will show that it would be very difficult, at the angle at which, from the pier, they are looking down the channel, to judge exactly. So might Brown's testimony be also explained, for, notwithstanding the heavy attack made on him by libelant's counsel, he was as honest an old fellow as ever testified in a court of justice.

The great weight of testimony, however, is to the effect that the *Plymothian* passed down the river as close to the eastern edge of the ship channel as loaded ships venture, and in the conflict of testimony on this important fact in the case, the Court must be guided by the preponderance of testimony, and especially by these disinterested witnesses, whose integrity is unquestioned, and who were in the best position to judge of the situation. The deck testimony of the *Plymothian* is unanimous to this effect—Ham (R., 184), Schroder (R., 203), Lyons (R., 209), Baird (R., 231), Wood (R., 238), Mardon (R., 268, 280), and Henley (R., 365), and, despite the statements by counsel that their testimony amounts to but little, for the reason that they knew nothing about the channel, and did not

even notice the buoys, can be relied on equally as much, and, in our opinion, very much more than that of the *Victory's* crew. They do notice the buoys, and testify with reference to them, with the exception only of Ham, who did not notice buoy 9.

Our disinterested testimony is conclusive, even to the most doubting, as it has proved to counsel for cargo, who, despite his manifest interest to hold the *Plymothian* in fault, as well, makes no charge against her navigators here.

Etheridge (R., 353, 354), and Goodwin (R., 373), on the tug *Commodore*, on the west side of the channel, in a position where the *Plymothian*, if on the west, would have sunk them, along with the barge *Storm King*, testify she went down on the east side, one saying as close as a loaded ship ought to go. Joe Clark (R., 402) and W. T. Harrison (R., 395), on the *Pioneer*, just inside of buoy 9, so state unequivocably. Wynne (R., 404) testified she appeared to him pretty close to the eastern side of the channel. So states Pebworth, on the *Virginia Dare* (R., 424), and Channel, on the *Olive* (R., 429), who passed down the river (presumably not more to the westward than mid-channel, as the *Princess* and *Storm King* were anchored there), leaving the *Plymothian* to the starboard (R., 429), stating that she was hugging the black buoys pretty close.

Can there be any question now on this point when these seven disinterested witnesses, with one exception practically alongside the *Plymothian* and in the best position to accurately note her movements, corroborate the positive statements of the seven witnesses from the deck of the *Plymothian* to this effect, especially in view of the weakness (on analysis) of the testimony on this point for the *Victory*.

On this question of fact the District Court has spoken in no uncertain language. It says:

"But it may as well be premised that the *Plymothian* had not before then, in coming out from Lambert's Point, gone over to the western side of the channel near to red buoy 22, and had not after doing so recrossed the channel to reach its position near buoy 9, as claimed by the *Vic-*

tory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. * * * The testimony is conclusive to that effect."

Again (R., 449):

"The *Plymothian*, on straightening out at buoy 9, had begun to move against the tide at the rate of four miles an hour. The *Plymothian* moved on a ported helm and kept well to the eastern side of the channel."

No less uncertainly has the Circuit Court of Appeals held; for it has found that the *Plymothian* straightened out at buoy No. 9, and proceeded down her starboard side of the channel, her proper course.

This Court, therefore, must take it as a proved fact that the *Plymothian* did not go to the west side of the channel, but, on the contrary, passed close aboard buoy 9 and down the river well over on the east side, as was her duty. If such be its conclusions, the entire fabric of the *Victory's* defense must fall. Her pilot navigates her solely with reference to the *Plymothian* being on the west side (R., 339); so does her master. All the pleadings are drawn based on that main fact; Elcoate being sufficiently reckless, in his answer to Ralli Brothers, sworn to after he left the stand, to place her by feet and inches on the west side with reference to the Merrimac buoy, as he had not dared to do when subjected to cross examination. Such is the theory of all of their testimony; thus their counsel's defense.

Taking the *Victory* even no further to the westward at Craney Island than mid-channel, and the *Plymothian* at and after passing buoy 9 on the east side, the vessels were port to port and the signal of the *Plymothian* of one blast, and her course based thereon, was as the law directed. The argument on this point in brief of *Victory's* counsel is most interesting as to the duties of vessels meeting end on or nearly so, or port to port, and lays done very clearly the duties of the *Victory's* navigator under such circumstances; and it is most unfortunate that he did not in this case steer by rule and not by judgment in order to make the best cut to Lambert's Point. The cut down of the *Plymothian* here was scarcely the best cut open to Pilot Nelson.

VII.

The *Plymothian's* whistle was not defective.

The most vicious attack made by the *Victory* against the *Plymothian* has been on the subject of her whistles. Their pleadings all the way through ring the changes on this subject, and especially the remarkable document sworn to by Elcoate after he had left the stand and filed as his answer to Ralli Brothers' libel (R., 436). The first of their disinterested testimony is replete with the same attacks, and it is not until the trial of the case in the lower court was reached and the overwhelming weight of disinterested testimony on this point was examined, on behalf of the *Plymothian*, that any check was had on this, their main contention.

These attacks, upon investigation, utterly fail. None of the *Victory's* crew of six men on deck, nor Pilot Nelson, hear a sound from the *Plymothian* (Elcoate only hears one faint sound) and only a few of them see two puffs of steam from her whistle. They hear no sounds of any kind; no salutes, no pass signals, no danger signals, testifying, too, on their solemn oaths. Wigham, South and Rankin (R., 22 27-30) hear only one faint sound, which they state the *Plymothian* made when she was close on top of the *Victory*. Swain (R., 293-297) says she gave him two whistles, very indistinct, full of water, but places her manifestly in a position she never occupied, and contradicting thereby every witness in the case. She could not have given him these signals, nor could he have been in that position. He hears no others save just two before collision, and he *can't tell from which vessel* (R. 297). He could not have been very much impressed with the defects of ours therefore.

Pratt (R., 306), hears the *Plymothian* blow one whistle, and in no way criticises it, and Page, Martin and Tweddle, all of whom are on the pier, and in the best position to notice any defect in it, all decline to testify on this subject. Surely had there been any such defects as are described by the *Princess* people, they would have noticed them and the libelant's counsel would have been very quick to give

their testimony on this point; yet their recollection is blank as to our whistles.

So much for the testimony against us.

To rebut this we produce, first, twelve witnesses who were on board the *Plymothian* at the time, all of whom state they heard her whistles, not once, but many times, and that they were all loud, clear and distinct, with nothing the matter with them: Scullard, (R., 173), Cronquist (R., 175), Pearse (R., 180), Ham (R., 185,) Schroder (R., 202, 204), Lyons (R., 209), Hendema (R., 220), Baird (R., 231), Wood (R., 238, 239), Ecrath (R., 256), Marden (R., 264), Henley (R., 363).

So also testify eight disinterested witnesses who were surrounding her at the time, most of them a short distance off, all of whom testify that they heard her whistles in leaving the dock, on saluting the tug, on signalling to the *Victory*, and upon reversing her engines, that they were all loud, clear and distinct, save only Harrison, who says that the first of the tug salute had some steam in it.

We do not deem it necessary to quote this disinterested testimony at length, but will merely cite the witnesses. See Etheridge (R., 353), Goodwin (R., 373, 374, 376), John I. Clark (R., 388 to 391), W. T. Harrison (R., 394, 395), Jos. M. Clark (R., 400, 402, 403), Wynne (R., 404 to 406), Pebworth (R., 424), Channel (R., 429).

The District Judge in his opinion, (R. 451), has found that the whistles of the *Plymothian* were as good as those of English steamers usually are, and were in good working order, and the Court of Appeals has found no fault with them.

In view of this overwhelming weight of testimony and these findings, the Court can entertain no charges against the whistle of the *Plymothian* as not being a lawful signal.

VIII.

The *Plymothian* signaled first and properly.

This has already been fully argued when we endeavored to show that the *Victory* did not signal first. To this we now refer, with the full confidence that our contention here has been fully demonstrated.

IX.

The *Plymothian* was moving under moderate speed, and, on the first indication of *Victory's* change of course, promptly stopped and reversed, with headway at collision entirely overcome.

We now approach the point at which the Circuit Court of Appeals has not followed the findings of the District Judge. Both Courts have held the *Victory* grossly at fault; the District Judge exonerated the *Plymothian* from all contributory fault of navigation, while the former has found her guilty of some undefined acts of omission.

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE FINDINGS OF FACT OF THE DISTRICT COURT, AS THE GREAT MAJORITY OF THE WITNESSES WERE EXAMINED BEFORE THE DISTRICT JUDGE, AND HIS FINDINGS CANNOT BE SAID TO BE CLEARLY AGAINST THE WEIGHT OF TESTIMONY.

It is a familiar rule in appellate practice that where the witnesses have been examined before the District Judge, and the evidence discloses conflicts, upon which the credibility of the witnesses has a bearing, Appellate Courts do not reverse the findings of fact, unless they appear to be clearly against the weight of evidence.

The *Grafton*, 1 Blatch., 173.
The *Sampson*, 4 Blatch., 28.
The *Florida*, 4 Blatch., 470.

The *Sunswick*, 5 Blatch., 280.
The *Guimarais Appeal*, 38 Fed. Rep., 528.
The *Thos. Melville*, 37 Fed. Rep., 271.
The *Albany*, 48 Fed. Rep., 565.
The *Alijandro*, 56 Fed. Rep., 621.
The *City of New York*, 54 Fed. Rep., 181.
The *Wilhelm*, 59 Fed. Rep., 169.

In the cases at bar the evidence was conflicting. Two pilots and seventeen of the twenty-one disinterested eye-witnesses were examined in open court; the District Judge is one of more than twenty years' experience in that district, is thoroughly acquainted with the waters in which the collision occurred, and the needs of navigation therein: is presumed to know, and did know, personally many of the disinterested eye-witnesses, who, being tugboat men, making their living in these waters, were able to give, and did give, the most intelligent account of the collision, from an unbiased standpoint and free from the excitement of impending danger. He was, therefore, peculiarly fitted to judge of their credibility, to properly weigh this conflicting testimony and to arrive at a just and proper conclusion. His conclusion, freeing the *Plymothian* from fault upon the facts, will be found after examination of the record to be not only not *clearly* against the preponderance of testimony, but fully sustained by the great weight of it.

Both courts having held the *Victory* at fault, her gross negligence in the collision can no longer be an open question.

We can, therefore, invoke another principle of law equally well established.

THE FAULTS OF THE *Victory* BEING CLEAR, IT IS NOT ENOUGH TO RAISE A DOUBT AS TO THE CORRECTNESS OF THE *Plymothian's* NAVIGATION. TO MAKE A CASE OF APPORTIONMENT, HER FAULT MUST BE CLEARLY ESTABLISHED BY AMPLE EVIDENCE, AND ANY REASONABLE DOUBT AS TO THE PROPRIETY OF HER NAVIGATION SHOULD BE RESOLVED IN HER FAVOR.

This principle is well established both in the lower courts and in the Supreme Court. The rule is well stated by Mr. Justice Brown, in the case of the *City of New York*, 147 U. S., pp. 71, 85, where, in delivering the opinion of an unanimous Court, he says:

"In view of the recklessness with which the steamer was navigating that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The *Ludvig Holberg*, 157 U. S., 60, 67.
The *Delaware*, 161 U. S., 459, 470.
The *Oregon*, 158 U. S., 186, 197.
The *Great Republic*, 23 Wall., 20.
The *Athabasca*, 45 Fed., 651, 655.
The *Manistee*, 7 Biss., 57.
The *H. Clay*, 72 Fed., 1021, 1022.
The *Mexico*, 78 F. R., 653, and cases.

The underwriters on cargo stand in no different position in this regard than the owners of the *Victory*. The apparent hardship of the cargo underwriters arises solely from the Act of Congress limiting their recovery against the principal wrongdoer; but for this statute limiting the ship owners' liability, they could have recovered their whole loss from the owners of the *Victory*. It is a mistake, therefore, to regard the position of "innocent cargo" as one of hardship, because the wrongdoing vessel is of a value less than the injury inflicted by her. Rates of insurance presumably are adjusted with regard to these limitation statutes. And where, owing to these statutes, full recovery cannot be had against the wrongdoer, their remedy against the other vessel must depend upon their ability to clearly prove contributory negligence on her part. The *Ludvig Holberg*, above cited, was a case in

which owners of cargo proceeded against one of the vessels charged with fault in collision, and this Court there reaffirmed, as to them, the principle above quoted from the opinion in the case of *The City of New York*, and in almost the same words.

This principle of "innocent cargo" seems to have had a most potent effect before the Circuit Court of Appeals, as their whole decision seems to be based upon the idea of giving complete indemnity to these cargo owners; for, while fully agreeing with the District Court as to the gross faults of the *Victory*, it proceeded to hold the *Plymothian* also to have been sufficiently negligent as to be deprived of her *pro rata* recovery on the *Victory's* bond and to require her to make up the deficit of such bond to the cargo owners.

The *Plymothian* does not appear to have been held in fault in any specific matter, save only in failing to adopt certain indefinite precautions, relating presumably to slackening speed, stopping and reversing under Article 21 of the Rules of Navigation.

The opinion charges her with "doggedly keeping her course, without taking any precaution whatever, until too late, and when the pending collision became inevitable": * * * that "the slightest change in the course of each or either of the vessels would have prevented the collision": * * * that "the Court cannot find anything in the records which shows any precaution taken by the *Plymothian* when she saw the *Victory* disregarding her signals and obstinately pursuing the course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision": * * * that "the *Plymothian* was guilty of an act of omission. The course of the *Victory* seems almost willful. The *Victory* was the chief cause of the disaster. If the *Plymothian* had taken the precaution which she should have taken, the disaster *might have been prevented*."

The Court does not hold, therefore, that, had these precautions been taken, the collision would have been prevented.

This of itself is sufficient for the Circuit Court of Appeals to be held in error, and the decision of the District

Court to be sustained. The authorities just quoted fully establish that the fault on the part of the *Plymothian* must be clearly proved and that every doubt must be resolved in her favor. It was therefore incumbent upon the Circuit Court of Appeals to point out definitely the faults of the *Plymothian*, and to have definitely held that such faults were not only clearly established by the weight of testimony, but that they also constituted a contributing cause to the collision.

An inspection of the record will not disclose, however, that any such fault existed in the navigation of the *Plymothian*, but, on the contrary, every precaution possible was taken by her the moment the *Victory* gave her a cross-signal, and by a change of course created the risk of collision.

According to the testimony of the *Plymothian*, when the first signals were exchanged the *Plymothian* was proceeding down the eastern side of the channel after passing buoy 9, and the *Victory* was coming up the river in mid-channel; the vessels were thus on each other's port bow, and were not moving in such direction as to involve risk of collision; it was only after the second repetition of the *Plymothian's* one whistle that the *Victory* gave the cross whistle and commenced her movement to the eastward under a starboard helm. The proof shows that the *Plymothian* was moving under moderate speed against the tide, not having had sufficient time after leaving dock to get the full effect of her engines; and that as soon as this cross whistle of the *Victory* was heard and her unexpected movement to the eastward was developed, the *Plymothian's* engines were reversed full speed, and by the time she was struck her headway had been entirely checked and she had possibly attained a slight backward movement as found by the District Judge (a finding not reversed by the Circuit Court of Appeals as far as its opinion discloses).

That is all that she could have done, all that the law required her to do.

The rule of navigation on this point is in the following language:

"Every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

According to the overwhelming weight of testimony the speed of the *Plymothian* was most moderate; there was no obligation therefore on her to slacken her speed.

The language of the rule does not require the vessel to stop and reverse unless it is necessary, and it is never necessary to do so on the mere approach of two vessels to each other. They must be approaching so as to involve risk of collision.

It is not against the law for steamers to run at moderate speed or even at full speed. That is the purpose of their construction; for courts to require steamers, on the mere approach of each other, to be stopping and reversing, or even slackening speed, is to relegate us to the days of canal boats.

The question of when it is necessary to stop and reverse is not always easy of solution. In deciding it, the Court must not be governed by the facts as they appear in the quiet of a court room, but it must place itself in the pilot house of the vessel and pass upon the situation as it appeared at the moment to the navigator, who must be accorded a reasonable discretion in selecting his time.

This Court has, in the case of the *Free State*, 91 U. S., 200, laid down the rule in the following language:

"It is not the rule of law, under the sixteenth of the articles enacted by Congress to avoid collision, when a steam vessel is approaching another vessel, and where a collision may be produced by a departure of the latter from the rules of navigation, that the former vessel is bound to slacken her speed, or stop and reverse. Each vessel may assume that the other will reasonably perform its duty under the laws of navigation, and if, upon this assumption, there could be no collision, the case under the sixteenth article does not arise. The steamer is not bound to take measures to avoid a collision until some danger of collision is present."

In the case of The *Delaware* 161 U. S., 469, Mr. Justice Brown says:

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of the way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent."

And concludes the discussion on this point by these words:

"In any event there is too much doubt about the fault of the *Talisman* to justify us in apportioning the damages."

See also The *Earl of Elgin*, L. R., 4 P. C., 7.

In The *Ceto*, 14 Ap. Cas., 670, Lord Hershell held:

"The necessity must not be such as to become manifest only when all the facts are ascertained. It must be such as would be apparent to a seaman of ordinary skill and prudence, with the knowledge which he possesses at the time."

In The *Emmy Haase*, L. R., 9 P. D., at page 83, the Court says:

"I may add that compliance with Rule 18, at the very moment when danger becomes apparent, is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously; a short, but a very short time, must be allowed him for this purpose."

The *Virgo*, 7 Benedict, 495.
The *Nereus*, 3 Benedict, 238.

Bearing these principles in mind, we now come to the testimony, and submit, with confidence, that not only is it not established by clear proof that the *Plymothian* was

negligent in the performance of her duties under R. 21, but that the great weight of testimony shows, on the contrary, that the measures to avoid collision were promptly taken on her part and efficiently carried out.

The *Plymothian* moving down, as we have shown, on the eastern side of the channel and the *Victory* moving up no further to the eastward of the channel than mid-channel, the vessels were thus on each other's port bow, and there was no risk of collision until this position was materially changed; consequently the *Plymothian* had a perfect right to assume that the *Victory* would perform her duties and keep her course, and was under no obligation either to slacken speed (moving herself moderately as we have shown) or to stop and reverse until the *Victory* commenced the eastward movement under her starboard helm.

It is to be remembered in this connection that the *Victory* was moving at about twice the speed of the *Plymothian*.

The evidence on the part of the *Victory* throws little light on this starboard helm movement of this ship; it all places her well over on the eastern edge of the channel from Craney Island up; in this respect it has been entirely discredited by the overwhelming weight of disinterested testimony, and in consequence has been utterly disbelieved by both the lower courts. We are forced, therefore, to refer to it only to see when the starboard signal of two whistles was sounded by the *Victory* and infer that the starboard movement began then or shortly before (Henley, 361, Mandon, 265).

The disinterested testimony of the *Victory*, considered even in this light, affords us little, if any, assistance; neither Swaine, Pratt, Page, Martin nor Tweddle give the position of the *Victory* when sounding her signals. Nor does Wigham on the *Princess;* South (R., 29), puts her four or five ship's lengths (*i. e.* 400 or 500 yards) from buoy 7 when she blew these signals; but Rankin on the same steamer, which was lying across the river from Lambert's Point pier, says (R., 31), that she was only distant from him a quarter of a mile when he heard these two blasts.

Of her crew three engineers, of course, know nothing

of her position then, nor do Stewart or Scott (R., 118). Candlish (R., 48), Gilbert (R., 71), agree with Captain Elcoate (R., 135), in saying that she blew these whistles when she was opposite the first schooner; and Elcoate continues to describe her position by saying that she was then five lengths (*i. e.* 500 yards) from buoy No. 7 (R., 135). Middleton says the *Victory* blew when the *Plymothian* was about half a mile off (R., 103); and Nelson (R., 330.) says she was about half way from Craney Island to buoy No. 7. But the matter is made more definite by Elcoate, the master of the *Victory* (R., 153), in the following testimony:

"Q. And what distance did you say the *Plymothian* was from you at the time the first signal was blown? A. I suppose *under half a mile; between a quarter and a half a mile.*

Q. When the first signal of two blasts was blown? A. Yes, sir; *about a quarter; nearer a quarter.*

Q. About a quarter of a mile? A. Yes, sir."

This tends to show that the movements of the *Victory* to the eastward were not made until the *Victory* was about 500 yards from buoy No. 7; and when the *Plymothian* was about 250 yards, making the distance between the vessels about 750 yards or less, as Elcoate himself admits.

The testimony of the *Victory* crew all agrees that there was a very short interval between her two sets of signals, and an equally short interval between the second set and reversing (Scott, R., 109); (Gilbert, R., 72); (Nelson, R.,341), and Elcoate (R., 135), and (R., 136), the latter stating the interval was about half a minute.

Special attention is called in this connection to the admission of Elcoate that he starboarded (R., 147), on sounding the two whistles and passing the first schooner, and to pilot Nelson, he says (R., 336):

"I did not want to run into her, because I saw the ship coming down on the Western side, *and of course I went to the eastern side* to give her room to go down to the west."

The testimony of the *Plymothian's* crew is all to the effect that this movement of the *Victory* to the eastward was sudden and not until the vessels were in close proximity, both in time and distance, to each other, and that immediately the engines of the *Plymothian* were reversed full speed and the helm thrown hard aport.

It will suffice to quote the testimony of her master and her pilot in this connection.

Mardon says (R., 265):

"We gave him the third whistle about a minute or a minute and a half after the second, and then heard two whistles and saw him starboard his helm. On hearing this cross whistle we blew three times and put the ship full speed astern. We had been straightened down the east side of the channel until we saw a collision was likely and then put the helm hard aport when we saw him come up on his starboard helm. The *Victory*—it is a little bit hard to judge of distance—but I should say was from 200 to 300 yards from us when we blew the whistles and put the engines full speed astern, and after the engines had been going astern a short while we heard him blow his signals and put his engines full speed astern, and he was coming up and hadn't time to stop before he was into us."

"Q. What effect did your engines being reversed have on your ship? A. From two to three minutes will stop her altogether. Q. How long after the engines were reversed before the collision happened? A. Nearly four minutes. About four minutes. Q. And you think her headway was checked for two to three minutes? A. Her headway was entirely checked before the collision."

Again, (R., 267-8):

"Q. I understand you heard no signals from her until you had blown three single blasts? A. Yes, sir. Q. Then you heard a cross signal? A. Yes, sir. Q. And then you gave the danger signal and put your helm hard aport, she giving three signals and reversing her engines? A. Yes, sir."

Again, on page 270, on cross-examination:

"She was coming up about the same until we heard her two whistles and saw her starboard her helm. Q. Was she coming up the mid-channel then all the time until you gave the two whistles, and at that time you starboarded?

A. Yes, sir; and went across the channel. Q. And those two whistles were given after you sounded the third whistle? A. After we sounded the third of our single blasts. As soon as the two whistles were blown, we sounded the danger signal and put our ship full speed astern."

So pilot Henley (R., pp. 360 to 364, 367 and 372) shows that this movement of the *Victory* under her starboard helm, to the eastward, with her cross signals did not occur until the vessels were about a thousand feet apart; that as soon as they were observed, the danger signals of the *Plymothian* were sounded, and her engines were stopped and reversed promptly and efficiently, and that, as the effect thereof, at the moment of collision, the speed of the *Plymothian* was fully checked, and she was positively making sternway.

That her headway was entirely checked at the collision has been shown by us in another connection. We again cite Lyons (R., 211), Baird (R., 232), Wood (R., 240, 239), Ham (R., 193), Etheridge (R., 355), Goodwood (R., 374-5), Clark (R., 388), Wynne (R., 405), and opinion of District Judge (R., 451).

It is submitted therefore, in the light of this testimony, that the *Plymothian* did not "doggedly" keep her course without taking any precautions whatever.

She had the right to assume, indeed it was her duty to assume, that the *Victory* would continue her course up mid channel, a position involving no risk of collision; and it was only encumbent upon her to adopt precautionary measures after the situation was changed by the action of the *Victory* to one of danger. She thereupon instantly stopped and reversed, and had become at the moment of collision, practically a stationary object. No court could require more of any vessel. It was impossible for her, with the *Victory* on her port bow, to have starboarded her helm and attempted to go to the westward. Such a movement would have resulted in an end-on collision, with more disastrous results to both vessels. Stopping and reversing was all that the law required, was all that the situation allowed, and by so doing promptly and efficiently, the *Plymothian* discharged her full obligation.

This is shown by the great preponderance of testimony; certainly there is a lack of *clear* proof to the contrary as required by the cases heretofore cited, especially the *Delaware* case. We cite also the case of The *Phœnix*, 58 F. R., 928, a case in which the District Court held only one vessel in fault, a delay in stopping and reversing being urged against the other. This decision was affirmed by the Circuit Court of Appeals in an opinion rendered by three Circuit Judges without dissent, the Court saying:

"But the testimony is in conflict upon the question of fact whether or not the master of the *Phœnix* delayed reversing, and, as the District Judge saw the witnesses, we accept his conclusion, since there is not a clear preponderance of proof the other way."

It is urged that there was no lookout specially stationed on the bow of the *Plymothian*, and that had one been so stationed, the first signals of two blasts, which neither the master nor the pilot of the *Plymothian* heard, would have been observed and possibly the collision might have been avoided by taking earlier steps.

It is true that there was no special man detailed and stationed on the bow to act as lookout; but the position was properly and efficiently filled by the master, Mardon, stationed well forward on the bridge in the best position to observe. Here there was no such conflict of duties as was the case on the *Victory* with Elcoate and pilot Nelson; with us the pilot, Henley, was navigating the vessel, and the master was keeping lookout and in no way interfering with the pilot's duties.

The testimony discloses the fact that the *Victory* blew two sets of starboard signals. The fault, if any, in not hearing these first signals contributes in no degree to the collision save in respect to not stopping and reversing earlier. It could have altered in no respect the course of the vessels, as we have already shown that it was impossible for the *Plymothian* to have done anything more than stop and reverse.

The witnesses from the *Victory* themselves show that the interval between these two sets of signals was very

short, about half a minute: Scott (R., 109), Gilbert (R., 72), Nelson (R., 341), and Elcoate (R., 135, and R., 136).

This is no less a time than should be reasonably allowed the navigator to observe the sudden movement of an approaching vessel and decide on his own best course (see the case of The *Emmy Haase*, *supra*).

The interval must be held too short to have constituted a fault contributing to the collision, especially in the absence of all proof, even attempting to show that by reversing earlier the *Plymothian* could have gotten out of the way of the *Victory* in her mad career. At most, the collision spot would have been shifted only a few yards to the southward, and the *Plymothian* would there have been struck with as great force as before.

For a loaded steamship of the size of the *Plymothian* to have done more in this interval of time and distance, after the starboard movement of the *Victory* was developed (a distance shown at the outside to be no greater than 250 yards), than have stopped her headway entirely at collision, as shown, was impossible. Having done this, her prompt action should be commended by the Court rather than held at fault.

The *Plymothian's* Helm.

The counsel for the *Victory* will doubtless in this Court, as in the lower courts, attempt to point out some discrepancies in the testimony of our witnesses in the matter of how the helm of the *Plymothian* was on the course down from the pier to the collision spot.

There may be some such discrepancies; with the number of witnesses examined, whose attention was directed to other occurrences at the time, it is only natural that there should be such. It would be highly suspicious if all the witnesses entirely agreed on this or any other point. But these discrepancies will be found on inspection to be slight and immaterial. The testimony of Captain Mardon and Captain Henley show very clearly the course taken by the *Plymothian*, and the manner in which her helm was operated, and it is entirely corroborated by the disinterested testimony produced in our behalf (see Mardon's

testimony R., 262 to 265, and 271, 272, also R., 273), where he says:

"Leaving Lambert's Point pier, the order was given to port until we got the ship's bow to buoy 9; then the order was given to hard aport; then, when we rounded number 9 buoy, the ship was headed straight up and down the channel, and the order was given to steady the helm, and the helm was kept steady to straighten down the east side of the channel, until we had gotten down close, after the whistles had been blown, then the helm was ported a little while, and then when the last whistles were blown and the engines put full speed astern, the wheel was put hard aport."

See also Henley, R., 367, 369.

The Log.

The fact that the log of the *Plymothian*, written up by the engineer after the collision, contains a full account of the movements of her engines from the moment of leaving the pier until after the collision, will doubtless also be the occasion for an attack on the part of counsel for *Victory*.

The chief engineer gives an entirely satisfactory explanation of this matter, stating that, as is the usual practice with all steamships, the orders from the deck are recorded by the engineer in charge of the engine, when received, on the bulkhead, or blackboard, in the engine-room, and from these entries the log is written; if nothing of moment transpires, only the main entry recording the departure of the steamship from port at full speed, is entered up; if, however, a collision or any other matter of importance occurs, that the full record, as shown on the bulkhead, is entered in the log; and that this was done on this occasion.

This attack is merely a device to forestall an attack on the logs of the *Victory*. His engineer's log (R., 163), fails to record such movements as should have been put on record, in view of such an important collision happening before the log is written up. Although elaborate testimony is given from the engine-room that the speed of the *Victory* was slowed down at Craney Island, and so con-

tinued for six minutes, and then, at exactly four minutes before the collision, the engine of the *Victory* was reversed, neither one of these important movements, which had such an influence on the serious collision that followed, find place or mention in the engineer's log of the *Victory*. No entry, from the time the ship left Hampton, at 3.30, until she struck, at 4.15, is found, save "working ship to order," and this, despite the fact that the log was not written up until after the collision, and the fact that Crowell, the engineer in charge of the engine-room, swore that he made a record of the movements (R., 83), at the time, and that it was in the log book; a statement which, on page 84, is explained by stating that he entered the time on the bunker, or side of the bulkhead, and then copied them and gave them to the chief engineer on paper, no scrap log being kept; when Paterson, the chief engineer, who wrote up the log book, is called on to explain why these records, which had been noted by the engineer at the time, were not included in his log, though written up afterwards, after this important collision had happened, with the full knowledge that every important fact would be the subject of a court investigation, he has no explanation whatever to offer (R. 89 to 92).

Can the Court pass, without comment, the failure of this officer, in charge of the records of the engine-room, to put down in such records the written notes handed him by the engineer in charge, after such a serious collision had happened?

Their deck log (R. 165) is just as imperfect and contains many statements which either prove the testimony of the crew willfully false or hopelessly unreliable. It unfortunately admits that the *Victory* was under starboard helm at and before she blew her first set of whistles; it says nothing as to their being forced over on the east side below Craney Island by passing steamers, and states that three steamers were passed to starboard, when it is in testimony that two of those passed to port; and it winds up with the statement that the *Victory* was making little or no headway *through the water* at the time of collision, when all of their witnesses state under oath, with one or two exceptions, that the *Victory* was making

sternway and that the *Plymothian* fell heavily on her bow with her port side practically under undiminished speed.

In conclusion we do not pretend in any degree to contend that all the statements of the twelve witnesses from the deck of the *Plymothian*, and ten disinterested witnesses, spectators, will agree in every detail, varying in no respect in estimates of distance or time; and had they sung the self-same song in every particular, their testimony would have been subjected to an even more severe attack, we doubt not.

What we have done, however, is to show, by the weight of testimony, from ordinary, every-day observers, mainly practical men, whose daily lives are led upon the waters of that river, that the facts contended for by us are true; that those asserted on behalf of the *Victory* have not been proved. This we consider we have done, and most effectually, in whatever way you choose to take the witnesses, applying whatever test the Court may see fit, taking either the whole list of witnesses for the *Plymothian*, against the whole list of witnesses for the *Victory*, or crew and pilot against crew and pilot, or disinterested testimony against disinterested testimony. The Court, we imagine, will be mainly guided by the testimony of these disinterested witnesses and the masters and pilots of the vessels.

Taken in that way, or in any other way, we are confident that we have the great weight of testimony with us.

Each fault ascribed to the *Victory* has been established; each charge made by the *Victory* against the *Plymothian*, namely, that she moved to the west side of the channel; that her whistles were defective; that she did not stop and reverse in sufficient time, has been entirely refuted.

This Court, as did the District Court, we feel, must hold that we are without fault; that we moved properly out from the pier down the proper side of the channel, giving the proper and lawful signals; that we stopped and reversed in the proper and lawful time; that while at least stationary in the water, in our proper position, we were wrongfully damaged by a steamer coming on her wrong side of the river, moving at an unlawful speed, after giv-

ing improper and unlawful signals, and after failing to adopt the proper precautionary measures, to prevent a collision, that are prescribed by law.

X.

Result of the decision of Circuit Court of Appeals much more disastrous to owners of *Plymothian* than contemplated by that Court.

It is believed that the consequences of the "modification" of the lower court's decree by the Circuit Court of Appeals are very much larger than were contemplated by the Court when rendering the decision. The opinion says (p. 503):

"The *Plymothian* was guilty of an act of omission. *The course of the Victory seems almost willful.* The *Victory*, no doubt, was the chief cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances, *it would seem to be manifestly inequitable to assess upon her one-half* of the entire loss."

It further says (p. 504):

"If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* ($67,500) to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency (the cargo damage was $71,000), so that the cargo owners obtain complete indemnity."

Inferentially, the Court only intended to impose upon the *Plymothian* this deficiency of $3,500, with, perhaps, a slight addition for costs.

The Court, however, seems to have taken no account of interest; calculating that, it will be seen that the aggregate amount due the cargo owners as of October 30,

1894, the date of the final decree of the District Court, instead of being $71,000, was $86,152 03
Deducting the amount of *Victory's* bond..... 67,500 00

We find the deficiency to be..... $18,652 03

This does not take into account some deductions on account of costs which were allowed on the *Victory's* bond in the liability proceedings, so that the full recovery of the cargo owners against the bond of the *Plymothian*, should this decision be allowed to stand, will amount to the full sum of $20,000, with interest from October 30, 1894.

In the collision the *Plymothian* herself was severely damaged. These damages, as ascertained by the Commissioner, and adding interest to October 30, 1894, amount to the large sum of..... $49,108 90
Adding to this the above 20,000 00

We find the total damage accruing to the owners of the *Plymothian* to be..... $69,108 90

This is as of October 30, 1894, from which date it, of course, carries interest.

Thus the loss to these owners, under the so-called modifications, by the Circuit Court of Appeals, is larger by $3,000 than the bond of the *Victory*, and almost equals the loss to be borne by the *Victory's* owners, a result "manifestly inequitable," in the language of Judge Simonton.

This will be found also to be within a few thousand dollars of the amount that the *Plymothian* would have had to pay, had she been grossly at fault also in the collision, and had the damages been assessed equally between the owners of the two steamships.

Another effect of this modification is to cast the entire burden of this heavy and expensive litigation in the three Courts upon the owners of the *Plymothian*, a result most extraordinary and inequitable.

We shall leave the question of comparative negligence to be discussed in the brief to be filed by the learned counsel who appears with us in the case.

XI.

The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

For all the cotton that was on board the steamship *Plymothian* at the time of collision, there were issued by the master of the steamship at Galveston, bills of lading containing two clauses, familiarly known as the "Negligence" clause and the "Flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage occasioned * * * by collision, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the *pilot*, master, mariners or other servants of the shipowner.") * * * (R., 487-489-490).

The "Flag" clause is as follows:

"*This contract shall be governed by the law of the flag of the vessel carrying the goods*, except the general average shall be adjusted according to York-Antwerp Rules, 1890. In accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agrees to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding" (R., 488-492).

The learned counsel for the cargo owners has contended in the lower courts that the greater part of this cargo of cotton was shipped under bills of lading which contained only the "Negligence" clause, without the "Flag" clause; an inspection of the record discloses that this contention cannot be successfully maintained.

By a stipulation between counsel (R., 483) it will be seen that, of the 3,682 bales of cotton constituting this cargo, 1,671 bales were shipped from Galveston under

bills of lading of the Texas-European Steamship Line, one of which bills of lading is printed in the record (pp. 485–488); these bills of lading all contain both the "Negligent" and the "Flag" clauses; so that as to these 1,671 bales there can be no question.

The other 2,011 bales of cotton were shipped from interior points on the Gulf, Colorado and Santa Fé Railroad on through bills of lading issued by this railroad company to the shipper, covering transportation via Galveston to Liverpool (Stipulation, 483).

The full form of this through bill of lading appears in the record (pp. 494–498); it contained the "Negligence" clause, but not the "Flag" clause, but has this stipulation prominently inserted therein:

"The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment."

These 2,011 bales, thus shipped, upon arrival at Galveston were delivered by the railway company to the steamship, and her master thereupon issued his ocean bills of lading, the full form of which is printed in the record (pp. 488–493).

They will be found as being used only in connection with the through bills of lading, and contain both the "Flag" clause and the "Negligence" clause; they contain also this further provision (R., 493):

"The goods referred to in this bill of lading are such portion of those mentioned in the through bill of lading, No. 48, Con. 287, dated Oct. 7, 1891, and shipped at Ardmore by N. P. Anderson & Co. (for SS. *Sandfield*), as have been actually put on board the steamer; but the said goods are only carried on the terms and conditions of this present Ocean Bill of Lading, and are to be delivered on the presentation of the said through bill of lading, and this Ocean Bill of Lading together; or upon the through bill of lading alone, provided that the master is satisfied by comparing the same with his copy of Ocean Bill of Lading, of the identity of the goods called for; and provided that the consignee gives a guarantee satisfactory to the shipowner against all claims by holders of the Ocean Bill of Lading, and to produce the latter in due course;

and indemnifies the owners and master against all claims by holders thereof, in consequence of delivery without production thereof."

Under the foregoing provisions of these bills of lading, used in connection with each other, and referring, in direct terms, to each other, it is submitted that the *Plymothian* is entitled to the exemptions contained in her ocean bills of lading.

By stipulation (R. 484), it is agreed that the *Plymothian* was at the time of the shipment of this cotton, and at the time of collision, a British vessel and sailing under the British flag. It was further stipulated that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, may be proved by reference to decisions of the English courts.

It has not been contended that under the English law they are invalid.

We refer in this connection to the cases cited on page 15 of our petition for *certiorari*, and to the case of the Phœnix Insurance Co. against Liverpool *et al.*, Insurance Co., 129 U. S., 397.

This case therefore presents to this Court the question whether the "Negligence" clause, exempting a ship from responsibility for the negligence of a pilot which she was compelled to take, or of its own officers, navigating the ship in conjunction with such pilot, will be upheld as a valid contract between the parties, where the contract expressly provides that it is to be governed by the law of the country to which the steamship and the consignee of the merchandise both belong.

This question has very recently been most elaborately argued by eminent counsel before this Court, and is now under its advisement. We submit it therefore without further argument.

XII.

The decision of the Circuit Court of Appeals should be reversed and the decision of the District Court restored in its entirety.

Respectfully submitted,

WHITEHURST & HUGHES,
CONVERS & KIRLIN,
Proctors for S. S. Plymothian.

FLOYD HUGHES,
Advocate.

INDEX.

PAGE

Statement 1

Facts 6

Decree of District Court 10

Decree of Court of Appeals 11

POINTS:

I. Victory's navigation was reckless in the extreme 13

1. She was under the rule for steamers meeting head on or nearly so, and therefore bound to port and keep to the right. She starboarded and attempted to pass to the left 13

2. The Victory was to blame for attempting to cross the Plymothian's course without obtaining a previous agreement by whistle signals 30

3. She was in fault for too great speed in a channel way, and for failure to slacken speed or stop and reverse earlier 31

4. Her excuses amount to an acknowledgment of guilt 33

II. The faults of the Victory being clear and gross, the burden rests upon her in order to make a case for apportionment, to establish fault on the part of the Plymothian, by clear and convincing proof.

Because of the exception of *collision* in all the bills of lading, the cargo rests under the same burden 36

1. The rule as between the ships 36

2. The rule as against the cargo 36

III. The Plymothian was not in fault for failing to stop and reverse earlier 44

1. The Plymothian's course and speed 44

PAGE

2. The Victory's position when she sounded her first two-blast signal is involved in a conflict of testimony, but on the clear weight of the evidence she was then to the North of Craney Island 45

3. The Victory's course was along mid-channel or to the west of it, and was not such as to involve risk of collision until she made a change to port as under a starboard helm just before sounding the two-blast signal that Plymothian heard 52

4. The Plymothian was justified in presuming the Victory would pass port to port until some contrary sign appeared which produced an actual risk of collision 62

5. The Plymothian would not have been bound to stop and reverse at once if she had heard a prior two-blast signal from the Victory at the time she claims to have blown it 64

6. No fault on the part of the Plymothian has been established, nor indeed alleged, under Inspectors' Rule 3 67

7. The headway of the Plymothian was completely stopped at the collision 69

8. As to all the above matters the burden of proof is on the Victory and on the cargo. The evidence not only falls short of being clear and convincing that the Plymothian was in any fault contributing to the collision, but, as we submit, it affirmatively establishes the contrary 71

IV. The Court of Appeals erred in overruling the finding of of fact made by the District Judge on the conflicting evidence of witnesses produced before him, that the headway of the Plymothian was completely stopped at the time of collision 71

V. The Plymothian was not in fault on the score of lookout 74

PAGE

VI. The Plymothian, if in any degree at fault for the collision, is freed from responsibility to her cargo by the express provisions of the bills of lading under which she carried it 76

VII. If any fault be found on the part of Plymothian, it was slight as compared with the faults of the Victory, and the Court should therefore apportion the damages in accordance with the degree of the faults..... 91

1. The form of the decree entered by the Circuit Court of Appeals was erroneous, whatever rule of division may be adopted..... 91

2. The Court may divide the damages in any proportion it thinks proper..... .....

LAST POINT.—The decree of the Court of Appeals should be reversed, and the Plymothian absolved from all liability either to the Victory or to the underwriters on cargo, but if such a decree be not entered, then only the smallest amount of damages consistent with the equities of the case should be adjudged against her..... 91 99

Supreme Court of the United States,

OCTOBER TERM, 1896.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Petitioner for limitation of liability as owner of S. S. *Plymothian*,

Appellant in this Court,

AGAINST

THE CANTON INSURANCE COMPANY (LIMITED) and others, Underwriters on Cargo, and JOHN MCINTYRE and others, owners of the Steamship *Victory*, Claimants,

Appellees in this Court.

No. 66.

JOHN MCINTYRE and others, Petitioners for limitation of liability, as owners of the Steamship *Victory*,

Appellants in this Court,

AGAINST

CANTON INSURANCE COMPANY (LIMITED) and others, Underwriters on Cargo, and PORT OF PLYMOUTH STEAMSHIP COMPANY (Limited), owner of Steamship *Plymothian*, Claimants,

Appellees in this Court.

No. 67.

BRIEF FOR PLYMOTHIAN.

Statement.

These proceedings were brought into this Court by writs of *certiorari*, issued to the United States Circuit Court of Appeals for the Fifth Circuit, in October, 1895.

The controversies presented grew out of a collision between the Plymothian and the Victory, in the channel of the Elizabeth River, near Norfolk, at about 4.15 P. M. of November 12, 1891.

The Plymothian, laden with a cargo of cotton and grain, was outward bound. The Victory was inward bound in ballast. The bow of the Victory penetrated the port side of the Plymothian, opposite the bridge, cutting into her below the water line, causing her to fill and sink shortly after the collision on the flats just outside the channel. Heavy damage to vessel and cargo resulted.

The Victory was also damaged about the bows.

The first libel was filed by S. Elcoate, master of the Victory, against the Plymothian, in the United States District Court for the Eastern District of Virginia, November 14, 1891 (p. 13). He alleged that the damages suffered by the Victory amounted to the sum of $10,000 (p. 13). This was followed on the 27th of November, 1891, by a libel filed in said District Court, by underwriters on the Plymothian's cargo, against both the Victory and the Plymothian, seeking to hold both liable for the damage to cargo, which was claimed to exceed $80,000 (p. 13).

Thereupon, and on the 3d of December, 1891, the petitioner, Port of Plymouth Steamship Company (Limited), filed a petition (p. 11) in said District Court, setting forth the proper jurisdictional facts, and

(1) Praying for a limitation of its liability for the damages growing out of the said collision; and

(2) Giving notice of its intention to contest its liability for any part thereof.

On the same day, John McIntyre and others, owners of the steamship Victory, filed a similar petition (p. 1).

Proceedings were then taken to appraise the amount or value of the owners' interest in the Plymothian and her pending freight (p. 481), which was fixed at $45,221, less $5,000 salvage, or $40,221 (p. 461).

Similar proceedings were taken to appraise the amount or value of the interest of John McIntyre and others,

owners, in the steamship Victory. The value of such interest was fixed at the sum of $67,500 (p. 459).

Thereafter, monitions were duly issued, requiring all persons having claims against the vessels, or their owners, to make due proof thereof (p. 481).

Pursuant to the monition issued in the proceedings of the Plymothian, claims were duly proved by the owners of the Victory, for their damages arising from the collision, amounting to $14,363.80 (p. 461), and by the Canton Insurance Company (Limited), and others, underwriters on cargo on the Plymothian, amounting to $71,420.97 (pp. 461, 462).

Pursuant to the monition issued in the proceedings of the Victory, a claim was duly proved by the Port of Plymouth Steamship Company (Limited), for its damage by reason of the collision, in the sum of $41.684.12 (p. 460). The Canton Insurance Company (Limited) and others also presented the same claims which they proved in the proceedings of the Plymothian (p. 460).

It will be perceived, therefore, that the damages which resulted from the collision, are:

Cargo damage	$71,420 97
Plymothian's damage	41,684 12
Victory's damage	14,363 80
Total damages (exclusive of interest	$127,468 89

The several claimants afterwards filed answers to the respective petitions for limitation of liability. The Canton Insurance Company (Limited) and others, answered the Plymothian's petition March 23, 1894 (p. 14). John McIntyre and others answered the same petition April 12, 1894 (p. 18).

The Canton Insurance Company (Limited) and others answered the petition of the Victory March 23, 1894 (p. 4). The Port of Plymouth Steamship Company answered the petition of the Victory April 14, 1892 (p 13).

The faults charged against the Victory in the pleadings of the Plymothian were:

(1.) In not keeping in a proper course on the right hand side of the channel

(2.) In not answering the single blast whistle signal from the Plymothian, and shaping her course accordingly.

(3.) In giving a cross-signal to the signals of one whistle blown by the Plymothian.

(4.) In proceeding in a channel way at an undue rate of speed.

(5.) In starboarding her helm and heading across the course of the Plymothian.

(6.) In not promptly stopping and backing (pp. 9, 12).

These faults were found against the Victory in both courts.

The faults charged against the Plymothian in the pleadings of the Victory were:

(1.) In not keeping out of the way of the Victory.

(2.) In not obeying the signal of two whistles, if the faint reply from her whistle was two signals.

(3.) In giving a cross-signal, if the same was a single whistle.

(4.) In not promptly stopping and backing.

(5.) In porting and throwing herself across the bows of the Victory (pp. 2, 19).

None of these charges was sustained by the District Court, and only the 4th in a modified form in the Court of Appeals.

The answers of the Canton Insurance Company (Limited) and others alleged faults against both vessels:

A.—Against the Victory:

(1.) In that she did not keep a good and sufficient look-out.

(2.) In that she was proceeding at too high a rate of speed.

(3.) In that she did not take a course up the western side of the channel.

(4.) In that upon receiving a signal from the Plymothian that she was proposing to go down the eastern

side of the channel, she did not at once assent thereto, and take the western side of the channel; or

(5.) If that was impracticable, that she did not instantly stop and reverse her engines, instead of persisting in proceeding up the eastern side of the channel (pp. 7–17).

All of these except the first appear to have been sustained in both courts.

B.—Against the Plymothian:

(1.) In that she did not keep a good and sufficient lookout.

(2.) In that she did not give earlier signals to the Victory that she proposed to go down the eastern side of the channel.

(3.) In that she did not, when the Victory failed to reply to her signal, or at any rate, when the Victory gave the signal of two blasts, indicating that she was proposing to go up the eastern side of the channel, instantly stop and reverse.

None of these was sustained *eo nomine* in either court. The Court of Appeals found the Plymothian guilty of "an act of omission"—something less than a fault—in not stopping earlier.

Upon the issues thus presented, the cause went to trial before Judge HUGHES, April 20, 1894 (p. 305).

The following witnesses were examined by the respective parties:

A.—By the Plymothian:

Henley, Pilot (p. 359).
Mardon, Master (p. 260).
Ham, Chief Officer (p. 183).
Wood, Second Officer (p. 237).
Scullard, Chief Engineer (p. 165).
Cronquist, Second Engineer (p. 173).
Pearse, Third Engineer (p. 178).
Lyons, AB., Wheelman (p. 208).
Baird, AB. (230).
Hendema, AB., Second Wheelman (p. 219).
Ecrath, Carpenter (p. 255).
Schroder, Steward (p. 201).

Brown, Craney Island Lighthouse Keeper (p. 346).
Goodwin, Captain tug *Commodore* (p. 372).
Etheridge, Mate of the tug *Commodore* (p. 353).
J. I. Clark, Captain tug *Mary & Joe* (p. 387).
J. M. Clark, Captain tug *Pioneer* (p. 400).
Harrison, Engineer, tug *Pioneer* (p. 404).
Wynne, Captain tug *Lumberman* (p. 403).
Harney, Captain Steamer *Luray* (p. 433).
Channel, Mate of the Steamer *Olive* (p. 428).
Page, Real Estate Agent (p. 313).
Sanford, Lloyd's Surveyor (p. 413).
Quigley, Jr., Shipwright (p. 419).

B.—By the Victory:

Nelson, Pilot (p. 329).
Elcoate, Master (p. 129).
Candlish, Chief Officer (p. 32).
Stewart, Second Officer (p. 117).
Gilbert, Third Officer (p. 60).
Pattison, Chief Engineer (p. 88).
Crowell, Second Engineer (p. 82).
Munro, Third Engineer (p. 85).
Middleton, AB. (p. 94).
Scott, Fireman (p. 107).
South, Mate steamer *Princess* (p. 25).
Wigham, Second Mate steamer *Princess* (p. 21).
Rankin, Second Engineer steamer *Princess* (p. 30).
Swain, Captain tug *Storm King* (p. 289).
Pratt, Captain steamer *Wanderer* (p. 305).
Wood, Foreman Boilermaker (312).
Martin, Lambert's Point Lighthouse Keeper (p. 318).
Tweddle, Clerk (p. 324).
Pebworth, Engineer steamer *Virginia Dare* (p. 423).

Statement of Facts.

The following facts appeared:

The Victory was a British steamer, of 1,774 tons net tonnage, 338 feet in length, 38½ feet in breadth, inward bound in ballast, drawing 17 feet aft and 13 feet forward. Her officers and crew numbered thirty-one all told.

The Plymothian was a British steamer of 1,016 tons net register, 260 feet long, laden with a cargo consisting of 3,682 compressed bales of cotton (p. 448). Her officers and crew numbered twenty-one all told. She was out-

ward bound from Galveston for Liverpool (p. 485), having put into Norfolk for bunker coal. Her draft was 14 or 16 feet (p. 370). Both vessels were in charge of pilots.

The collision occurred in a straight stretch of the channel of Elizabeth River, between Craney Island Lighthouse and the turn in the channel at the buoys opposite Lambert's Point. There are two of these buoys, a red one numbered 22, known as the Merrimac buoy, on the westerly side, and a black one numbered 9, on the easterly side. The distance from buoy No. 9 to Craney Island Lighthouse is 1,967 yards on the chart (Exhibit X. (p. 480), Appendix), or about a mile and an eighth (p. 449). The course is N. ½ E. and S. ½ W. The channel and buoys are shown on the lithographed section of chart No. 403 (which is also an exhibit, p. 480), at the end of this brief.

The place of the collision was at black buoy No. 7, at the extreme *easterly* edge of the eighteen foot curve of the channel, 1,200 yards south of Craney Island Lighthouse, and 767 yards north of black buoy No. 9.

The channel is 250 yards wide at Craney Island, and broadens to 450 yards at buoy No. 9 (p. 448).

The Plymothian had been taking coal at Lambert's Point pier, a short distance southeastward of buoy No. 9. She left the pier at 4 P. M., heading out off the buoy, her course from the pier to the turning point down the channel being northwesterly at an angle of 45 degrees to the axis of the channel (p. 448). The usual departing whistle signal was blown as she moved away from the pier (p. 300). Proceeding outwards to round buoy No. 9, with the helm slightly aport (pp. 263, 300, 184, 238), the engines were at half speed until the buoy was close aboard off the starboard bow (pp. 263, 360). The engines were then put at full speed and helm hard aport (pp. 263, 360, 282). A strong flood tide was running southward with a force of about two knots (pp. 37, 360, 361). This swept the ship's stern right up, bringing her head northward and straight down the channel (p. 360). She rounded buoy 9 inside of a ship's length off (pp. 202, 209, 220, 231, 238, 263, 360, 353, 373, 389, 395, 401, 431), and when abreast of it steadied her helm (pp. 263, 300, 214, 219), on a course straight down

the right hand or easterly side of the channel (pp. 360, 365, 268, 280, 424, 429, 353, 354, 373, 402, 395, 404, 209, 184, 203, 231, 238).

Both of the lower courts have so found (pp. 450, 449, 499).

At this time the Victory was seen both by the captain and the pilot of the Plymothian to be coming up the channel (southward) below Craney Island Light (pp. 365, 264), to the westerly side of mid-channel, and on their port bow (pp. 361, 362, 264). The Plymothian thereupon blew a passing signal of one whistle just as she passed buoy 9 (pp. 264, 360, 361, 424, 404, 238, 231, 229, 202, 353, 373, 338, 390, 400), and a minute later repeated it, without receiving any reply from the Victory (pp. 360, 361, 264, 265).

The vessels were clearly over a mile apart at this time, with a bend in the channel between them (p. 354 also chart). The wind was southwesterly with force enough to enable sail vessels to make two or three knots against the tide (p. 47). It may be that the vessels were then beyond the range of ordinary whistles, or that the sound was deflected by the wind. Neither, at this time, heard any whistles from the other.

The Victory meantime had been maintaining her general course, so as to pass well clear port to port (pp. 210, 239, 221). She had ported her helm (presumably in rounding the bend at Craney Island buoy), so as to show the whole of her port side and port quarter to those on the Plymothian (pp. 361, 363). The Victory, indeed, admits straightening up to the channel course of S. ½ W. from Craney Island up (pp. 332, 335), which necessarily implies a porting at the lighthouse.

The Plymothian, after proceeding some distance straight down the starboard side of the channel, ported more towards the east bank (pp. 273, 367, 369). As the vessels were thus proceeding on safe lines port to port (pp. 361, 264, 210, 239, 221, 231, 236), the Victory about three minutes after porting at the lighthouse made a perceptible change of course towards the easterly side of the channel as if under a starboard helm (pp. 361, 265). On seeing the

change, the captain of the Plymothian said to the pilot: "Pilot, what is that fellow doing?" (p. 361). The pilot at once blew another single blast on his whistle (p. 361), and receiving two in reply (p. 361), immediately reversed his engines, sending them full speed astern, blew a danger signal of three blasts of the whistle, and put the helm hard aport (pp. 361, 265). The Victory a minute or more later (pp. 364, 265; Candlish, pp. 51, 56; Elcoate, p. 136) also blew a danger signal, and then or shortly afterwards claims to have reversed her engines three lengths away from buoy 7 (p. 136), but not in time to stop her headway, due to high speed and the force of the flood tide (*vid.* Nelson, 333; *Tweddle*, pp. 325, 328).

The Plymothian, under the influence of reversed engines and hard aport helm, came to a standstill before the collision, with buoy 7 close under her starboard bow (pp. 211, 232, 240, 239, 193, 355, 374-5, 388, 405; Op., 451), but the Victory came on, colliding with her port side at the bridge at an angle variously estimated at from 45 to 60 degrees, penetrating about fifteen inches into the strongest part of the ship, through her three steel decks, her stringer plates and beams. The force of the blow threw the Plymothian's head around to starboard, so that buoy 7, which prior to the collision had been under her starboard bow, was seen by the Victory's witnesses and others to come around in *front* of the Plymothian's stem to her port bow (pp. 40, 50, 161, 220, 274, 275, 338). This showed conclusively that the Plymothian was fully stopped, and probably making some sternway when the blow was received.

It was found that the Plymothian was rapidly filling with water, and to prevent her sinking in the channel, her engines were put full speed ahead until she grounded on the mud flats to the eastward of the channel, where she sank in shallow water, filling fore and aft. She was subsequently raised by aid of salvors, repaired temporarily at Newport News, and finally in England on completion of the voyage.

The Victory, although damaged about the bows, was able to proceed to Norfolk. She was also temporarily repaired at Newport News, and finally repaired in England.

The District Judge, finding the facts substantially as above stated, held the Victory solely in fault for the collision, and decreed a recovery by the owners of the Plymothian, and the owners of her cargo, *pro rata*, to the extent of the bond filed by the owners of the Victory, in their limitation proceeding. The figures of his decree were as follows:

Amount required to be paid in by Victory, less costs incidental to establishing the right of limitation of liability ($67,500 less $1,138.48)		$66,361 52
Of this sum, the owners of the Plymothian were adjudged entitled to recover		24,478 78
Canton Ins. Co.	$5,281 23	
Triton Ins. Co.	2,640 61	
Indemnity Mutual Marine Co.	8,896 43	
Atlantic Mutual Ins. Co.	1,981 88	
London Assurance	5,512 72	
C. T. Bowring & Co.	1,043 09	
Standard Marine Ins. Co.	5,152 63	
British & Foreign Marine Ins. Co.	1,283 15	
Insurance Co. of North America	10,091 00	
		41,882 74
		$66,361 52

The Canton Insurance Company (Limited) and others, underwriters on the cargo, as well as the owners of the Victory, appealed from the decree of the District Court to the Circuit Court of Appeals for the Fourth Circuit. That Court affirmed the decree below, so far as concerned the faults found against the Victory. As to the Plymothian, it held that "it would seem to be manifestly inequitable to assess upon her one-half of the entire loss" (p. 503), yet found she was guilty of "an act of omission" (p. 503), not clearly pointed out in the opinion. In the result, the decree of the District Court was modified by awarding the

whole of the Victory's bond to the cargo, imposing upon the Plymothian the whole burden of her own damages ($41,500), and requiring her to make up the deficiency of the cargo damage.

The result of the Court of Appeals decision to the Plymothian (excluding the costs in the Court of Appeals, which are not shown), was as follows:

Cargo damage to be recovered (p. 460).....		$71,420 97	
Interest thereon from December 1, 1891, to the date of the final decree, June 10, 1895 (pp. 513, 515)...	$15,117 44		
Costs awarded (p. 514)	1,287 18		
		16,404 62	
			$87,825 59

The amount of this decree to be paid by the *Victory* was:

Value of her bond.....	$67,500 00		
Less costs of establishing her limitation from liability.	1,138 48		
		$66,361 52	
Interest from October 30, 1894, to June 10, 1895.....		2,433 26	
		$68,794 78	
Less costs paid to *Plymothian* in District Court.....		840 90	
			$67,953 88
Deficiency to be made good by *Plymothian*.....			$19,871 71

The loss to the *Plymothian* on the face of the decree was, therefore, her recovery against the *Victory* in the lower Court....	$24,478 78	
And the Cargo Underwriters' deficiency, required to be made up...	19,871 71	
Total.....		$44,350 49

Expressed in another way, she was required to bear the whole of her own damage.....	$41,684 12	
And to pay the Underwriters on cargo.....	19,871 71	
Making her whole burden under the decree of the Court of Appeals, exclusive of interest..		$61,555 83

These damages were imposed upon the Plymothian by the Court of Appeals, in consequence of "an act of omission" (p. 503), a sort of blemish on her navigation so

slight that "it would seem to be manifestly inequitable to assess upon her one-half of the entire damage" (p. 503).*

The Port of Plymouth Steamship Company, Limited, sued out a writ of *certiorari* in No. 66, and John MacIntyre and others sued out a writ in No. 67. The cases have now come on to be heard upon the return to those writs.

---

* A division of damages under the ordinary rule, as of date November 12, 1897, six years after the date of collision, counting in interest on all items up to that date, would be substantially as follows:

Cargo loss (p. 460)	$71,420 97		
Interest	25,711 55		
		$97,132 52	
Plymothian's damage (p. 460)	$41,684 12		
Interest	15,006 24		
		56,690 36	
Victory's damage (p. 461)	$14,363 80		
Interest	5,070 96		
		19,434 76	
			$173,257 64
Total damages			$173,257 64
Half damages to each			$86,628 82
Damages suffered and paid by *Plymothian*			56,690 36
Balance to pay			$29,938 46

POINTS.

I.

The Victory's navigation was reckless in the extreme.

1. *She was under the rule for steamers meeting head on or nearly so, and, therefore, bound to port and keep to the right. She starboarded and attempted to pass to the left.*

The question as to what rules the vessels were bound to observe at and shortly before the collision, a matter considered at some length in the decisions of the District Judge, and of the Court of Appeals, is now decided by the case of the *Delaware*, 161 U. S., 459. The vessels were in pilotage waters, in the command of pilots, and were, therefore, under R. S., Sec. 4233, the rules of the Supervising Inspectors, and the custom or usage generally followed in the navigation of Elizabeth River.

(**a**.) RULE 18 of Section 4233 provides as follows:

"If two vessels under steam are meeting end on, or "nearly end on, so as to involve risk of collision, the "helms of both shall be put to port so that each may pass "on the port side of the other."

(**b**.) The rules of the Supervising Inspectors which were put in evidence (pp. 344, 345, 430, 431, 432), provide:

"RULE I. When steamers are approaching each other 'head and head' or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course and thereupon shall give as a signal of his intention one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other; but if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head' or nearly so, the pilot so first de-

ciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left or on the starboard side of each other.

"NOTE.—In the night, steamers will be considered meeting head and head so long as both the colored lights on each are in view of the other.

"*Second situation* (see diagram p. 345). Here the *green light only will be visible to each*, the screens preventing the red light from being seen. They are therefore passing to starboard, which is rulable in this situation, *each pilot having previously signified his intention by two blasts of the steam whistle.*"

"RULE II.—When steamers are approaching each other *in an oblique direction* (as shown in diagram of the fourth situation), *they shall pass to the right of each other, as if meeting head and head or nearly so*, and the signals by whistles shall be given and answered promptly as in that case specified."

"RULE III.—If when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

(**c**.) It was proved, and not disputed, that by a custom, known to the captain of the Victory, steam vessels passing through this channel in opposite directions were bound to keep to the right.

On this subject Captain Mardon, of the Plymothian, testified (pp. 268, 269):

Cross-examined by Mr. Sharp:

"Q. You say, captain, that it was the duty of the Victory from the time she passed Craney Island all the way up to keep on the west side of the channel? A. No; I don't say from the time she passed Craney Island. I say from the time she got under way in Hampton Roads up to

Lambert's Point she ought to have kept on the west side of the channel.

"Q. You say it was her duty from the time she hove anchor in Hampton Roads to Lambert's Point to keep on the west side of the channel? A. Yes, sir.

"Q. And it was the duty of the Plymothian—— A. Or any other steamer to keep down the eastern side.

"Q. We are speaking of the Plymothian. It was the duty of the Plymothian to keep on the east side going down under all circumstances? A. Yes, sir.

"Q. Under all circumstances as to each; that is your idea of the way that river ought to be navigated? A. Yes, sir.

"Q. Whether practical or not? A. There are states of danger when you have to vary from your course to save a collision.

"Q. The only navigation (of the Plymothian) as far as the helm was concerned, was to keep on the east side of the river? A. Yes, sir" (pp. 268, 269).

"The east side was our proper course. I looked down there more especially to see that it was clear" (p. 270).

"Q. If you were coming up the channel from Hampton Roads and saw a vessel coming out from Lambert's Point pier dock, which side of the channel would you assume that vessel would take, after she got steady? A. Down the east side.

"Q. You would expect her to go down the east side? A. Yes, sir, and act accordingly" (p. 280).

"Q. What consultation did you have with the pilot on that day in reference to going down the east side? A. Had none.

"Q. Did you express those views to him? A. No, sir.

"Q. Did he communicate to you what the rule was in regard to the western side? A. He did not communicate to me, because he knew I knew as well as he did.

"Q. How did you acquire that information? A. By ten or twelve years in this country, being here several times and at Newport News.

"Your idea is—— A. By the United States law, a ship going down——

"Q. State the law? A. Coming up, leave the red buoys on the starboard bow; going down, keep the black buoys on the starboard bow" (p. 277).

Pilot Henley, of the Plymothian, who has since been elected one of the Board of Pilot Commissioners (p. 359), also testifies to the usage (p. 372):

"Q. Why did you take the eastern side? A. That is the proper side for a man to take, if it is clear to take that side.

"Q. And coming up, vessels take the western side? A. Yes, sir.

"Q. That is the regular course of navigation in all channels? A. Yes, sir.

"Q. Each vessel takes the starboard side? A. Yes, sir.

"Q. Even if the starboard side makes them take a little longer course than to take the other course? A. Yes, sir."

This evidence is not disputed, and the custom is proved to have been known to Captain Elcoate of the Victory.

"Q. You have been in Norfolk before? A. Been running here ever since these last five years" (p. 151).

"Q. And you are acquainted, I suppose, with the rule of the road that in rivers and narrow channels the vessel bound down shall go the right and the vessel bound up shall go to the right? A. Yes, sir; where practicable.

"Q. You made no effort on that occasion to go to the right? A. We kept in the mid channel when the mid-channel was clear. * * *

"Q. Did you make any suggestions to him (pilot) that he should keep over to the right? A. Not one.

(**d**.) The vessels were approaching each other in such directions and with such bearings as required both, under the above rules and custom, to keep to the right.

Their positions when the Victory was to the north of Craney Island Light, and the Plymothian to the south of buoy No. 9, are unimportant. The distance between those points is a mile and an eighth. The testimony establishes and both the lower courts have found, that when the Plymothian was at buoy 9 nearly opposite the breakwater off Lambert's Point pier, the Victory was a short distance to the north of (p. 365) or near Craney Island (*vid. post*, pp. 45-58).

(**e**.) When the Plymothian straightened down the channel opposite and close to buoy 9, she was near the eastern side and headed straight down on the channel course N. $\frac{1}{4}$ or $\frac{1}{2}$ E. (pp. 360, 365, 268, 280, 209, 184, 203, 231, 238, 424, 429, 353, 354, 373, 402, 395, 404). The course

from the north side of the coal pier, at which she had been lying, out to buoy 9, was one of about 45 degrees to the axis of the channel (p. 448). In rounding the buoy, she had, therefore, to make a swing of four points. She did not, however, proceed directly to the buoy on a straight line, and make her swing from there, as contended by the Victory, but commenced to port her helm immediately on leaving the pier (Mardon, p. 263; Henley, p. 300; Ham., p. 184; Wood, p. 238). On nearing the buoy, it was hard ported (Henley, p. 360; Lyons, wheelman, p. 209), so that her swing to the channel course was completed, and the helm was steadied with the vessel's head pointing straight down the channel just as the steamer passed buoy 9 (Henley, p. 360; Mardon, p. 263; Lyons, p. 209).

On passing buoy 9, her own witnesses show that she was well on the eastern side of mid-channel. Pilot Henley says they passed from 40 to 60 feet of the buoy (p. 360). Captain Mardon says from 20 to 30 feet (p. 263). Second officer Wood says 20 feet (p. 234). Lyons, wheelman, says: "We passed close upon the buoy" (p. 209). Hendema, second wheelman, says 50 feet (p. 220). Baird, A. B., says 40 or 50 feet (p. 231). Schroeder, steward, says may be 50 feet (p. 202).

The independent witnesses speak to the same effect.

Mate Etheridge, of the tug *Commodore*, which was on the western side of the channel, a little above the Merrimack Buoy, No. 22, estimates that the Plymothian passed within 50 or 75 yards of buoy 9 (p. 353). Captain Goodwin of the same tug estimates that she passed it "Not over 50 yards," possibly less (p. 373). J. I. Clark, captain of the tug *Mary and Joe*, who was standing on the north side of Lambert's Point pier, in a position to see everything that happened in the river at that point, says she rounded buoy 9 about half of her length off (130 feet) (p. 389). Harrison, engineer of the tug *Pioneer*, which he says was pretty near abreast of the black buoy at Lambert's Point, and to the east of it (p. 394), says the Plymothian passed within 35 or 40 feet of the buoy (p. 395). Captain J. M. Clark of the same tug, who places his vessel

just below buoy 9 (p. 400), estimates the distance at not over 50 yards at the outside (p. 401).

Channel, mate of the *Olive*, bound down the river at the time, says he passed the Plymothian close to buoy No. 9, and left her on his starboard side. "It looked to me she was hugging the buoys pretty close."

The contention set up by the Victory in her pleadings, and which her officers and crew attempted to sustain, that the Plymothian was swept over to the westerly side of the channel in rounding buoy 9, was negatived by her pilot, Nelson, who, though placing her somewhat further out in the channel, yet in the main corroborates the witnesses for the Plymothian. Nelson says:

"Q. When did you first see the Plymothian? A. Saw her coming out of the slip.

"Q. What slip? A. Lambert's Point pier. * * *

"Q. You saw her go over from Lambert's Point pier? A. Yes, sir, *and straightened down the middle of the channel*" * * * (p. 331).

"Q. You noticed when she came out and got about mid-channel, she hung in mid-channel some time, and then she went to the eastern side? A. Yes, sir.

"Q. You don't desire to correct that in any way? A. No, sir.

"Q. And as for the period she was hanging in mid-channel, it may have been a minute or two? A. Going down, sir.

"Q. Hanging down the mid-channel? A. Yes, sir.

"Q. And that was about one or two minutes? A. Yes, sir, I suppose so (p. 342).

The width of the channel at buoy 9 is about 450 yards (p. 348); hence Nelson's evidence would have put the Plymothian, when rounding, to about 200 feet off buoy 9.

On this evidence the District Judge found (p. 450) that—

"The Plymothian had not * * * in coming out from Lambert's Point, gone over to the west of the channel, near to red buoy 22, and had not after doing so recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect."

Both of the lower Courts found that the Plymothian was always on her own side of the channel.

(f.) Victory after rounding the bend at Craney Island was west of mid-channel, heading up the channel course. Her pilot says that *below* Craney Island Light he had been keeping *on the western side* of the channel (p. 335); that he passed a river steamer at Craney Island (335), and another about a hundred yards behind the first (p. 335). When he came to them he was in midchannel.

"Q. Before you met these steamers were you on the middle of the channel, the east or west side? A. *Middle of the channel*" (p. 336).

Captain Elcoate says no change of helm was made for those steamers (p. 152).

On examination of the channel of the Elizabeth River (shown in Exhibit X, in Appendix to this brief), it will be seen that the vessels, as placed by Nelson, the Plymothian near mid-channel, about opposite buoy 9, and the Victory in mid-channel, after porting around the bend near Craney Island (pp. 332, 335), if steering the channel course, as both concede they were (Henley, pp. 360, 365; Nelson, 332, 335), would be exactly head to head.

The evidence of other witnesses shows they were so. Captain Mardon (pp. 264, 270), pilot Henley (pp. 361, 363, 366, 368), mate Etheridge of the *Commodore* (pp. 354, 358, 359), engineer Harrison of the *Pioneer* (p. 399), and Captain Wynne of the *Lumberman* (p. 411), who were from a half mile to a mile away at the time, but in favorable positions for observation, place the Victory in mid-channel at the time of passing Craney Island.

Brown, keeper of Craney Island Light, standing on his platform at the lighthouse as the Victory passed, noticed her on account of her excessive speed, and observed that she was then *closer to the western* or starboard bank of the channel than he thought was safe (pp. 346, 348).

Mate Channel of the steamboat *Olive*, who passed down

and had met the Victory in the neighborhood of Craney Island, passing her *port to port* (p. 428), said:

"She looked to me she was just about as close on Craney Island as she ought to have been" (p. 429).

Captain Harney of the steamboat *Luray*, who passed the Victory *port to port* just below Craney Island (p. 433), says she was then "a little on the starboard hand of the channel, coming up, *on her starboard side of the channel*" (p. 433).

Captain Goodwin of the *Commodore*, himself on the western side of the channel, says:

"Q. How was he (Victory) in respect to the channel when he passed Craney Island—was he on the middle or on the east or west side? A. *He was on the west side* (p. 375)."

This evidence, for the most part disinterested, which is not seriously disputed, except by those on the Victory's deck, fully confirms the evidence of Captain Mardon, of Pilot Henley, and of the other witnesses for the Plymothian, that when the Victory was in the neighborhood of Craney Island, she was certainly not to the eastward, but probably was to the westward of mid-channel, was well on the Plymothian's port bow, and, therefore, by all rules, bound to keep to the right.

(g.) The courses of the vessels from the time the Plymothian passed buoy 9, and the Victory passed Craney Island, are not in reality very much in dispute.

It is true the Victory's witnesses say they were at that time and afterwards on the easterly side of the channel, but the Court will see by reference to chart, Exhibit, X, that there are no buoys at that place on the easterly side. As they were not acquainted with the width of the deep water channel apart from information shown by buoys, they had nothing to go by in forming their estimate except buoys 7 and 9. But as the channel is somewhat narrower at buoy 7 than at buoy 9, the witnesses would have to be to the westward of mid-channel at Craney Island in order to see through between those

two buoys. A line drawn to the eastward of buoy 9, passing close to the westward of buoy 7, would lead to the westward of mid-channel at Craney Island.

The evidence already referred to shows that they were certainly not to the eastward of mid-channel when opposite the lighthouse; certain circumstances testified to by themselves also show it. They admit starboarding twice for different schooners and hard starboarding just before the collision, making a change, on their own admissions, of a point and a half (pp. 337, 137, 147, 34, 37, 47, 62, 63, 78), and on the facts, unquestionably something more; yet they place the heading of their vessel at the point of collision as S. S. E. (Elcoate, p. 138; Candlish, 161). Heading the vessel in that direction at the buoy as we have done on the diagram submitted herewith, and working her course backwards, we find she would be in mid-channel in about three times her length northwestward of the place of collision.

If she had been on the east side of the channel at Craney Island within forty feet of the bank, as testified, it would have been impossible for her to have been at the place of collision heading S. S. E. On the contrary, she would have been ashore from a quarter to a third of a mile to the northward of that place..

Both of the lower courts, on an overwhelming weight of evidence, have found that the Victory was not prevented by other vessels in the channel either from going on the westerly side or from staying there (pp. 451, 502), whilst the pilot virtually admits that his object in heading over for the easterly side of the channel just before getting to buoy 7, was to cut off some of his distance into port by passing close to buoys 7 and 9, instead of running the extra distance that he would have had to run by keeping on the westerly side of mid-channel around the bend at Lambert's Point (p. 337).

It is apparent, as the learned District Judge remarked, that—

"The thoroughly disproved testimony given by her [Victory's] master and the deck witnesses of her crew * * * has no other value in the case than to show

that these witnesses felt the pinch of Article 21 (International Channel Rule) and made desperate efforts to excuse the obstinate and fatuous perseverance of their navigators in keeping on the eastern, and to them, as they well knew, the contraband side of the channel."

(b.) The meeting rule (No. 18), as was held in the opinion of the Court of Appeals (p. 501), required both vessels on approaching to port their helms and pass port to port. The first rule of the Supervising Inspectors is to the same effect.

Counsel for the Victory seeks to avoid the application of these rules by contending that the Plymothian was so far to the westerly side of mid-channel, and the Victory so far to the easterly side, as to make a case under the "First Situation," illustrated by the Supervising Inspectors (p. 345), that is, a position such, that had it been dark, the vessels would have been green to green. But even then, passing starboard to starboard, is permissible conditionally only—"*each pilot having previously signified his intention by two blasts of the steam whistle.*"

No such agreement having been reached, the Victory plainly had no right to act on the assumption that the vessels were within that rule. In fact, they were not. The proofs clearly show that the vessels were never in that situation after the Plymothian had rounded buoy 9, and was straightened down the channel, and Victory had rounded Craney Island (p. 339), and straightened up S. ½ W. (pp. 332, 335).

All the evidence agrees that a few minutes after straightening down, Plymothian ported a little, and then hard ported. Therefore, even if the Victory was heading at a gradual angle across the channel all the way from Craney Island, as is argued, the vessels would have been approaching each other in an oblique direction, which would have brought Inspectors' Rule 2 (p. 430) into operation, and under that rule "*they shall pass to the right of each other, as if meeting head and head, or nearly so.*" Both courts have found that there was nothing in the way of their doing so (pp. 451, 502). The starboard hand rule does not apply to cases of vessels approaching around bends in channels (The *Velocity*, 3 P. C.,

44; The *Ranger*, 4 P. C., 519; *Marsden*, Coll. (3d Ed.) 344, 427, 466, 468, 513). It is assumed they will conform their courses to the channel bank, and meet as if head and head.

(**i**.) The District Judge considered that the vessels were bound to observe the provisions of Article 21 of the Regulations of 1885, which provides:

"In narrow channels every steamship shall, when safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

The Court of Appeals was apparently of the same opinion (pp. 500, 501), and said (p. 501):

"Whatever construction we may give to these words, if we conclude that the Victory, in Elizabeth River, was governed, not by the regulations of the Act of 1885, but by the regulations theretofore in force, embraced in Section 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned Judge enforced here, 'Keep to the right.'"

By this it is assumed the Court meant to find as a fact that the vessels were approaching each other either (1) head and head, or nearly so, and therefore bound to port and pass to the right by Rule 16; or (2) that they were approaching in oblique directions, and therefore bound, under Rule 2 of the Supervising Inspectors, to port and keep to the right, and (3) that there was nothing to prevent her doing her duty in this regard.

(**j**.) Both the lower courts were right in holding that each vessel should have kept its own starboard side of the channel, whatever rules may be thought to have been applicable, or whether any statutory rule was applicable; for this Court repeatedly held, before any port hand or channel rule was adopted, either by the Congress or by the inspectors, that vessels approaching each other in narrow channels, or where their courses diverged as much as one and a half or two points, were bound to keep to port and pass to the right.

Each pilot is bound, with peculiar exceptions not applicable here, to keep well over to the side on his starboard hand, and the fact that the bends in the channel might at times bring one on the starboard of the other, does not affect this rule (The *John S. Hasbrook*, 93 U. S., 405, 407; *Union S. S. Co.* v. *N. Y. & Va. S. S. Co.*, 24 How., 307; *N. Y. & Baltimore Transp. Co.* v. *Phila. & Sav. S. T. Nav. Co.*, 22 How., 461; The *Vanderbilt*, 6 Wall, 225, 229, 230; The *Johnson*, 9 Wall., 146, 149; The *Empire*, 26 U. S. App., 152; *Towboat No. 1*, 74 Fed., 905; The *Luckenbach*, 50 Fed., 129; *Parsons*, 1 Ship & Adm., 569; The *Velocity*, 3 P. C., 44; The *Ranger and the Cologne*, 4 P. C., 519; *Marsden on Collisions* (3d Ed.), 344, 427, 466, 468, 513).

The absence of a channel rule in the code established by R. S., Sec. 4233, caused no great inconvenience, as the general rule of navigation was well settled; but it is worthy of remark that in the rules recently adopted by Congress for *harbors, rivers and inland waters*, which went into operation October 7, 1897, the general custom and practice has been embodied in Article 25, which reads:

"In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

This is precisely the rule embodied in International Article 21, that the District Judge held was applicable to the vessels.

It may be desirable to call more particular attention to a number of the cases in which the principle now embodied in the statute has been enforced in the decisions of this Court in channel cases as a general rule of navigation.

In The *Johnson*, 9 Wall, 146, the courses of the vessels are indicated in a diagram (p. 149). The propeller *Burden*, with a tow alongside, was proceeding up the East River on the easterly or starboard side, parallel with the shore. Just above the Fulton Ferry, where the bridge now stands

there is a bend which the tug would have turned on a port helm. The steamboat *Scranton*, with a tow on each side, was bound down the river from Corlears Hook, on the New York side, to a point below Fulton Ferry on the Brooklyn side. She was steering diagonally across the river. The vessels were *approaching each other on intersecting lines*, when they sighted each other around the bend near Fulton Ferry.

"The *Scranton*, when about opposite the upper part of Fulton Ferry slip, starboarded her helm, and at a rapid rate swept in on a curve toward the Brooklyn shore, with the purpose of running in under the bow of the propeller and picking up a boat lying on the lower side of the lower pier of Fulton Ferry slip. The propeller seeing the steamer thus coming dangerously toward her, blew one whistle, which is the regulation signal to indicate that she intended to keep to the right, and those on the steamer testified that she blew two whistles, which is the regulation signal that would have indicated that she was going to the left; but the men on the propeller did not hear the two whistles and of course gave no answering signal. The men on the propeller, as it rather seemed, could not at that time have done anything to prevent a collision if they had heard the whistles."

The result was that the steamer ran directly into the canal boat which was lashed to the propeller and did her *and her cargo* serious injury, also injuring herself. Both vessels were libeled for the damage. In the Circuit Court, the *Johnson* was held solely to blame, and this decree was here affirmed. Mr. Justice CLIFFORD, in delivering the opinion, said:

"Prior to the passage of the act of Congress prescribing sailing rules, as well as since that time, steam vessels approaching each other from opposite directions, so as to involve risk of collision, were required to put their helms to port so that each may pass on the port side of the other, and the Court is of the opinion that *that rule is applicable in this case, although the collision occurred before that act of Congress went into operation* (The *Sussex*, 1 W. Rob., 275; The *Niagara*, 3 Blatchf., 37).

Suppose it to be true that these vessels were approaching each other on intersecting lines, so that they would have collided if they had not changed their course, then it is

clear in view of the circumstances that each was bound to port their helm and pass to the right, as there was nothing to prevent them from complying with that well-known rule of navigation. They were navigating in the day time and in good weather, and they had an unobstructed view of what was before them; but the *Johnson*, instead of complying with that rule of navigation, put her helm to starboard for the purpose of crossing to the Brooklyn side and taking another boat in tow, which was lying in the dock just below the lower slip of the Fulton Ferry. Descending the river, as the *Johnson* was, at the rate of seven miles an hour, she obeyed her helm readily, and aided by the reflex tide as she left the stream she came round quickly so as to head towards the shore, and as she advanced on her new course she struck the canal-boat on her port side and caused the injury described in the libel."

In Union S. S. Co. v. *N. Y. & Va. S. S. Co.*, (1855,) 24 Howard, 307, the rule was applied in a case of collision in the channel of Elizabeth River. The steamship *Jamestown*, outward bound, "*intending to take the eastern side of the channel*" (p. 310) "rounded Lambert's Point" buoy near by and set the course at night N. ¼ E. Whilst passing down the channel two lights of an inward bound steamer were seen on the port bow. The helm of the *Jamestown* was ported, "to sheer the steamer still closer to the eastern side of the channel." Soundings which were being taken having shown that the vessel was about to ground on the easterly side, orders were issued to stop and reverse the engines. "Both orders were promptly obeyed, and it was then the master first discovered that the approaching steamer (*Pennsylvania*) had altered her course, and was heading *diagonally across the channel* [to the S. E.] towards the *Jamestown*. They were then less than a quarter of a mile apart, and seeing that a collision was almost inevitable, he instantly directed the alarm bell to be rung and the whistle of the steamer to be sounded" (p. 311). "Among other things, the pilot (of the *Pennsylvania*) admits that *shortly after his steamer passed the lightship, he gave the order to starboard the helm; and what seems even more remarkable, in cases of this description, he acknowledges that he gave the order after he knew that another steamer was approaching*, though he

denies that he had seen her lights" (p. 312). The *Pennsylvania* was held solely to blame.

The opinion of the Court concludes (p. 314):

"But the great fault committed on the occasion was that of putting the helm to starboard instead of keeping the course or porting it when it became known that the other steamer was approaching."

In *N. Y. & Balt. Transp. Co.* v. *Phila. & Savannah Stm. Nav. Co.*, 22 Howard, 461, a steamer ascending the Delaware River about four miles below Marcus Hook, came in collision with a descending propeller with a barge in tow. The propeller claimed she was proceeding down the river on the eastern side of the channel; that the steamer was coming up on the western side, and that the steamer, when about three quarters of a mile distant from the propeller, changed her course more out into the stream of the river, (to the eastward) heading diagonally across the channel and ran with great force and violence against the barge, striking her on the starboard side (p. 469).

(These are substantially the contentions made by the Victory in the present case.)

The Court found (p. 471) that, "At the place where the collision occurred the channel of the river is about three-fourths of a mile wide, and the evidence shows that there is a cove or bend in the river below, so that a vessel coming up the river in the night time would appear to an inattentive or casual observer standing on the deck of a descending vessel, *as being near the western shore, when, in point of fact, she was in mid channel* (p. 471)."

Mr. Justice CLIFFORD (at pp. 472, 473) said:

"On the part of the respondents, this proposition of fact [change of course by the steamer] is denied, and they insist that the fault was committed by the propeller, in omitting to port her helm and go to the right. *Beyond question, the law is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side.* * * * After a careful examination of the depositions, we think it is clearly proved that both vessels as they approached each other were near mid-channel. Most of the witnesses on board the steamer ex-

pressly affirm that she was near mid channel when the lights of the propeller were first discovered, and they all agree that her helm was not changed, except for the purpose of bringing the lights of the propeller one point on her larboard bow, until the propeller starboarded her helm and attempted to cross the bows of the steamer. That movement of the propeller was a direct violation of the rules of navigation, and was entirely without any excuse. Her master may have been deceived as to the course of the steamer by the slight bend in the river; but if so, it is the misfortune of those who employed him that he was not better acquainted with the navigation or more attentive to his duty."

In The *St. John* (154 *U. S.*, 586), the tug *Pluto*, with tows, was bound up the Hudson River, keeping to the right-hand or easterly side of the channel. The *St. John*, a passenger steamer, was going down, also keeping to her right or westerly side of the channel. On nearing West Point, the *St. John*, supposing the *Pluto* to be nearer to the western shore than she was, blew two blasts and endeavored to cross over and pass down starboard to starboard and to the eastward of the *Pluto*. Collision having ensued, the *St. John* was held solely to blame, Mr. Justice BRADLEY observing (p. 587):

"The *St. John* selected her own course, instead of *going to the right of the Pluto, as is usual*. She concluded to go to the left, miscalculating the precise position of the *Pluto*, and supposing her to be nearer to the western shoer than she was."

In the *Vanderbilt*, 6 Wallace, 225, it was distinctly held that where the usage in navigating a river is that both the ascending and descending vessels shall keep to the right of the centre of the channel, the omission to comply seasonably with that requirement, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible; and that *compliance with such a usage is required* in all cases where the course of a vessel is such that if continued there would be danger of collision with other vessels navigating in the opposite direction.

This was a collision between the steamtug *Hubbard*,

which was descending the Hudson River on the western side, and the steamer *Vanderbilt*, going up too near the western side of the channel. The District Court held the *Vanderbilt* solely to blame.

NELSON, *J.*, at Circuit (p. 227), held:

"The point pressing on the steamer is that she was too far to the west (left-hand side) of the channel of the river and *therefore out of her proper course.* * * * The west side is the natural and ordinary track for descending vessels, and the *Vanderbilt* we think was bound to take notice of this fact and to have kept nearer to the middle of the river. She had no right to act upon the idea that the descending boat would take that course and expect her to pass to the left or starboard between her and the west shore."

Mr. Justice CLIFFORD, in delivering the opinion of this Court (at pp. 229, 230), said:

"The usual pathway of steamers ascending the river (Hudson) is on the east [right-hand] side of the centre of the channel, but the *Vanderbilt* came up on the western side in the usual pathway of descending boats and vessels, and the testimony proves that she was moving through the water at nearly double the rate of the steamtug with the tows. * * * Plain inference from the position and character of the blow is that the steamer had ported her helm, and when the collision occurred was steering towards the east side of the shore * * * Steamers approaching each other from opposite directions are *required by the general rules of navigation*, as well as by the recent Act of Congress, to port their helms and pass to the right. * * * Proofs in this case show that the *Vanderbilt* ported her helm, but the change of her course was so late that it insured the collision. * * * The great fault was that she did not change her course and pass to the eastern side of the channel (right-hand side) before entering the fog bank, as all the witnesses agree she might have done without danger or serious inconvenience."

(**k**.) The conclusion from this examination of the authorities would seem to be that the Victory was plainly in fault in that (1), meeting the Plymothian head and head, she did not port and keep to the right, as required by rule

[illegible]; (2) in that, if she was crossing the channel diagonally, and thus obliquely approaching the Plymothian, bound down on the right side of the channel, she did not obey the provision of the Inspectors' 2nd rule by porting and keeping to the right; (3) in that she did not observe the general rule of navigation prevailing for narrow channels by keeping on the starboard side of the channel and passing the Plymothian port to port; (4) in that she disobeyed the proved local custom of the Elizabeth River to keep to the right, a custom with which her master was acquainted, and which the vessel was bound to follow (The *James Bowen*, 52 Fed., 510; The *Vanderbilt*, 6 Wall., 225).

(2.) *The Victory was to blame for attempting to cross the Plymothian's course from the right to the left-hand side of the channel without obtaining a previous agreement by whistle signals.*

On the evidence of her pilot, the Victory, when about half way from Craney Island to buoy 7, blew two blasts on her whistle to the Plymothian, and in less than half a minute thereafter two more blasts, and although she received no assenting reply, starboarded her helm and proceeded on a line diagonally across the channel into the port side of the Plymothian, which she struck at buoy 7, outside of the 25-foot curve on the east bank of the channel and nearly over to the 18-foot curve. The proof is overwhelming that the Plymothian, when *Victory* began her change of course, was close to the easterly side of the channel, steering a straight course down, and both the Courts below have so found.

The Victory's pilot says he did this to cut off some of the distance to Lambert's Point, by heading over for buoy 9, instead of remaining on his own side of the channel (p. 337). It was only an incident that this took him across the bows of the Plymothian.

It is too well settled to require discussion that such a maneuver, without previous agreement of whistles, is the grossest kind of a fault. In the very similar case of the *Johnson* (9 Wall, 146, 155) Mr. Justice CLIFFORD dealt with this subject as follows:

"The signal, even if given before the order to starboard, was nevertheless too late to justify the steamship in attempting to cross the bows of the propeller; but the Court is satisfied that the signal, if given as alleged by the appellant, was not understood by those in charge of the propeller, and that it was culpable rashness, in view of the circumstances, for the steamboat to attempt to cross the bows of the propeller, before receiving any signal that the propeller was willing to co-operate in the proposed change of course. Those on board the steamboat received no answer to their signal, and it is reasonable to suppose that if they were attentive to their duties, they must have known that those in charge of the propeller did not understand their signal, and consequently if they made the proposed change in the course of their steamer, a collision would follow; and if they did not so understand the matter, it was their own fault. Viewed in any light, the propeller was not at fault, and the responsibility must rest on the steamboat. Our conclusion is, that the *Johnson* is liable for the whole damage."

(**3**.) *She was in fault for too great speed in a channel way and for failure to slacken speed or stop and reverse earlier.*

At Craney Island the Victory's high speed was remarked by the lighthouse keeper, his attention being attracted to the boat by the fact that she was going so fast. He judged her speed there was about 12 miles (p. 346). Her full speed is admitted to be 9 to 10 (pp. 47, 131), and her witnesses admit a tide force of two knots (p. 37). But it is claimed her speed was reduced at or about the time of passing the lighthouse to half speed (Gilbert, 61, 75). It is admitted, however, that her speed from there on was five and a half knots *through the water* (p. 48), or seven and a half knots over the ground, and the Court of Appeals found that from Craney Island up her speed through the water was six or seven miles an hour with a two mile tide assisting her (p. 449). This would make her speed over the bottom 8 or 9 miles.

She was 338 feet long, and probably would not be able to stop with the tide behind her inside of four or five times her length (The *Normandie*, 43 Fed., 151, note 159). If she was within this distance from Plymothian when she star-

boarded and blew her last two-blast signal, then she was in fault for not being in better command as to speed before attempting that hazardous manœuver.

If by previous starboarding, she had got herself in such position in the channel that she could not port and keep on her own side, leaving the Plymothian free to proceed down her side, the Victory should have reversed, certainly as early as when her alleged second two-blast signal was blown and not assented to by the Plymothian.

She did not do even this much toward avoiding the collision. Candlish, said that the reversing signal was not given until a minute or so after the second two-blast signal (pp. 51, 56). Captain Elcoate admits that it was half a minute (p. 136), while Pilot Henley, of the Plymothian, says, he immediately reversed on hearing the cross signal, and blew three danger signals, but did not hear Victory blow her danger signals until about a minute after that (pp. 364, 265).

That the Victory blew her danger signals after those of the Plymothian is shown by other and disinterested witnesses. That she could not have reversed as early as the Plymothian did is shown by the result. At the collision, the Plymothian's headway was completely stopped, with buoy 7 under her starboard bow (pp. 211, 232, 240, 239, 193, 355, 374-5, 388, 405, op. 451), and by the force of the blow her head was knocked to starboard, so that the Victory's witnesses admit seeing this buoy come around *in front* of the stem to the port side (pp. 40, 50, 161). This fact and the evidence of disinterested witnesses shows that she was completely stopped and probably receding.

That the Victory had headway on is proved, not only by her pilot's evidence (p. 333) but also by two significant facts: (1.) that she threw the Plymothian's bows around to starboard, so as to bring the buoy from the starboard to the port bows of Plymothian; and (2.) that her bow cut through the Plymothian's three decks and three heavy iron stringer plates, a distance of at least fifteen inches (Quigley, pp. 420-421), damaging her own starboard bow as far back as three feet.

The extraordinary pretension put forward in the Victory's evidence that Plymothian had *sideway* on at the time and fell down across the Victory's bow with her port side, against a tide with a force of two knots, hardly requires discussion.

(**1**.) *The excuses the Victory immediately set up for being on the wrong side of the channel at the time of the collision are an acknowledgment of guilt.*

(**a**.) Her claim that she starboarded because the Plymothian was three points or four on her starboard bow when they were a half or three-quarters of a mile apart, is based on an obvious error.

The Court will observe, by a reference to the chart, Exhibit X, that with Plymothian in mid-channel, where she was located by the Victory's pilot (pp. 331, 342), it would be impossible to place the Victory anywhere in the channel three-quarters of a mile off and heading the channel course so that she could have the Plymothian more than a half point on either bow. On the other hand, with Victory in mid-channel, where she admits she was until she starboarded for schooners, or even on the eastern side, a vessel bearing three points on her starboard bow would be over on the Flats, a long way west of the western channel bank, as shown on our diagram.

The only time at which Plymothian could have been on the Victory's starboard bow was when the Victory was below Craney Island. The course there is about south by east, prior to the westward change which is made at Craney Island (Nelson, p. 339). Even then she could not have had Plymothian on her starboard bow much more than one point.

She was not, however, justified in acting on that bearing, since the Plymothian had a right to assume that when the Victory reached Craney Island she would make the change called for by the bend at that point (The *Velocity*, 3 P. C., 44; The *Ranger and the Cologne*, 4 P. C., 519), as she actually did (Henley, pp. 361, 366). The pilot of the Victory was bound to govern himself by the bearings of the vessels as they were after he had straightened

up the channel course from Craney Island south, and at that time he was on the Plymothian's port bow, and she must have been on his port bow (p. 264).

(**b**) The Victory's claim that she was forced over to the east line of the channel by passing steamers is false.

The master claimed to have met four steamers, and that all of them gave him signals to pass to starboard. The first was a tramp steamer (p. 131), and astern of her were three river steamers (pp. 131, 132).

The proofs failed to support this claim. It turned out that the tramp steamer was three miles ahead of the river steamers (Elcoate, 145), and the Victory's pilot says he does not think the tramp gave any signals (Nelson, 330). The river steamers were small, light-draft vessels, not bound to the narrow limits of the channel. The first of these, it seems, was passed some distance to the north of Craney Island (Candlish, 34, 46; Middleton, 112; Elcoate, 132, 145, 146; Gilbert, 61); the second at or near Craney Island Lighthouse (Candlish, 46; Elcoate, 146), although Gilbert states that the second steamboat also was passed to the north of the lighthouse (p. 68). Candlish says they met the third steamboat a third of the way from Craney Island to buoy 7 (p. 46); Elcoate, a quarter of a mile above the lighthouse (p. 146); Gilbert says just above Craney Island (p. 69); while Middleton says the second was passed opposite the lighthouse, and the third, one length behind the second (Middleton, 102). The pilot, however, admits that the steamboats did not force the steamer out of her course (p. 330); while the captain himself finishes off the story with this evidence (p. 152):

"Q. *Did you have to change your helm for any of those three river steamers?* A. *No, sir.*

"Q. But when you met those river steamers you were so far on the eastern side of the channel? A. *No, sir; we were on the middle of the channel as near as we could get.* They came down the western side."

Moreover, witnesses from two of the three river steamers, the *Luray* and the *Olive*, were examined in behalf of

the Plymothian, and testified positively that they passed the Victory port to port (Harney, 433; Channel, 428). No witness from the other, the *Louise*, was produced to contradict them.

(**c**.) The Victory's statement that a procession of schooners, met with after the steamers passed, kept her from keeping the starboard side of the channel, is also false.

There was no claim in the proofs that the Victory met with more than two schooners between Cranev Island and buoy 7, although it is claimed a third was on their starboard bow at the time of the collision. Mate Candlish indeed intimates there were but two altogether, and that the second was abreast of the Victory at the collision (pp. 57, 58). Both were in mid-channel (pp. 34, 47, 70, 80). The Victory's other navigators agree that the schooners were close behind them at the collision (pp. 58, 147, 66). But, as it is 1,200 yards from the lighthouse to buoy 7, and it is not claimed that the schooners were of enormous size, there was plainly plenty of room for the Victory to have crossed the channel several times between the lighthouse and the buoy. Both of the lower courts so found.

(**d**.) Her claim that she could not have ported at the last moment because of a schooner on her starboard bow was no justification, if true. It was not true. The schooner was at least 100 feet from Plymothian, and Victory could easily have passed between (pp. 280, 364). It is suggested in the Victory's evidence that the Plymothian ought to have starboarded to avoid the collision. If there was room for the Plymothian to starboard without hitting the schooners, there must also have been room for the Victory to port.

(**e**.) Her excuse of an agreement of signals to pass starboard to starboard, which was set up in the pleading (p. 2), utterly failed, even on the evidence of Captain Elcoate, who verified it (pp. 135, 154, 158, 342, 343).

II.

(1.) The faults of the Victory being clear and gross, the burden rests upon her, in order to make a case for apportionment, to establish fault on the part of the Plymothian by clear and convincing proof. In such case the contributing fault must be established beyond a fair doubt.

(2.) Because of the exception of "collision" in all the bills of lading, the cargo rests under the same burden.

(**1.**) *As between the two ships the application of this rule can hardly be contested.* It has been laid down in terms of unmistakable plainness in The *Carroll*, 8 *Wall.*, 302, 306; The *Great Republic*, 23 Wall., 20, 35; The *City of New York*, 147 U. S., 71, 85; The *Oregon*, 158 U. S., 186, 197; The *Delaware*, 161 U. S., 459, 470; and in the decisions of the lower courts: The *Luckenbach*, 8 U. S. App., 9; The *Mexico*, 78 Fed., 653, 655, 656; The *E. A. Packer*, 49 Fed., 92, 96; The *Athabasca*, 45 Fed., 651, 655; The *Manistee*, 7 Biss., 37.

In The *Umbria*, 166 U. S., 404, 409, Mr. Justice BROWN reaffirmed the principle:

"Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in The *City of New York*, 147 U. S., 72, 85, and The *Ludvig Holberg*, 157 U. S., 60, 71, *that any doubts regarding the management of the other vessel, or the contribution of her faults, if any*, to the collision, should be resolved in her favor."

(**2.**) *By reason of the exception of "collision" in all the bills of lading, the same rule should be applied as against the cargo.*

Omitting from consideration here the effect of the "negligence" and "flag clauses," we find an exception in all the bills of lading of "collision" *eo nomine*, and of

damage arising from "perils of the sea and dangers of navigation" (pp. 487, 490, 495).

Even if there was no exception of collision in the bills of lading, damage to the cargo from sea water entering through a hole in the side of the ship, made by collision, would be *prima facie* a loss within the exception of perils of the seas, and in such case, without proof of negligence on the part of the shipowner, the libelants could not recover (The *Xantho*, 12 App. Cases, 503); but the express exemption of "collision" makes the matter more clear. It changes the liability of the Plymothian to her cargo from that of a common carrier to that of a bailee.

In *New Jersey Steam Nav. Co.* v. *Merchants Bank*, 6 How., 344, 382, there was an exception "not responsible for the loss of any goods, wares, merchandise, money, &c." A sum of money was lost in transit, NELSON, *J.* (p. 382), said:

"The owner by entering into the contract, virtually agrees, that in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence."

As soon as the carrier shows the damage is within an exception in the bill of lading, the burden of proof shifts, and the shipper, to defeat the operation of the exception must prove want of skill or diligence (*Transportation Co.* v. *Downer*, 11 Wall, 129; *Ry. Co.* v. *Reeves*, 10 Wall, 176; *Clarke* v. *Barnwell*, 12 How., 272, 280; *Wertheimer* v. *Penn. Ry.*, 17 Blatchf., 421; The *Neptune*, 9 Blatchf., 193; The *Glendarroch*, 1894 Prob., 226; The *Hindoostan*, 67 Fed., 794 (C. C. A.); The *New Orleans*, 26 Fed. Rep., 44; The *Norway*, *B. & L.*, 404, 407, 408; *Phillips* v. *Clark*, 2 C. B., N. S., 156; *Wild* v. *Pickford*, 8 M. & W., 443, 459; *Zeech* v. *General Steam Navigation Co.*, L. R., 3 C. P., 14; *Craig* v. *De Largy*, 16 Scotch L. R., 750; *Dobbie* v. *Williams*, 21 Scotch L. R., 667; The *R. D. Bibber*, 8 U. S. App., 42; The *Cleveland*, Newb., 221; *Union Ins. Co.* v. *Shaw*, 2 Dillion, 23; *Casks of Sherry Wine*, 7 Benedict, 509; *Dedekam* v. *Vose*, 3

Blatchf., 44, 77; The *David and Caroline*, 5 Blatchf., 266).

And unless it is shown by the shipper that the loss might have been prevented by the use of due care, the damage is presumed to have occurred without negligence (The *Live Yankee*, Deady, 422, The *R. D. Bibber*, 8 U. S. App., 42).

Transportation Co. v. *Downer*, 11 Wall., 129, was an action brought to recover damages for the loss of 84 bags of coffee shipped upon the propeller *Buffalo* at the City of New York, to be transported to Chicago. They were damaged by water, owing to a stranding on the voyage.

The bill of lading exempted the company from liability for loss occasioned by *dangers of navigation on the lakes and rivers.*

The defense was, that the loss of the coffee came within this exception. The plaintiff showed that the defendant had the coffee for transportation, and that it was damaged and spoiled while in its possession. The defendant then showed that the loss was occasioned in the manner above stated; that is, by one of the dangers of lake navigation. The plaintiff then endeavored to prove that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill.

The defendant moved the Court to instruct the jury as follows:

"If the jury believed, from the evidence, that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, *then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence.*"

The Court refused to give those instructions, and on the prayer of the plaintiff, instructed the jury as follows:

"The bill of lading in this case excepts the defendant from liability, when the property is not insured from perils of navigation. It is incumbent upon the defendant to prove itself within the exception, *and it is the duty of the defendant to show that it has not been guilty of negligence.*" *Held*, error.

Mr. Justice FIELD, in delivering the opinion of the Court, said:

"On the trial, the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller *Brooklyn*, in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, *dangers of lake navigation*, include all the ordinary perils which attend navigation on the lakes, and, among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. *The burden of establishing such negligence and inattention rested with the plaintiff, but the Court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the Court erred.* In *Clark* v. *Barnwell*, 13 *How.*, 272, the precise point was involved, and the decision of the Court in that case is decisive of the question in this. And that decision rests on principle.

"A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. *There was no presumption, from the simple fact of a loss occurring in this way that there was any negligence on the part of the company.* * * * The grounding of the propeller, and the consequent loss of the coffee, may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence or inattention *The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other.* If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff."

In *Railroad Co.* against *Reeves*, 10 Wall., 176, Mr. Justice MILLER, in dealing with this point, said:

"Now, when it is shown that the damage resulted from this (an excepted cause) immediately he is excused. *What is to make him liable after this?* *No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as released him, and then to prove affirmatively that he did not contribute to it.* If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

And in *Clark* v. *Barnwell*, 12 How., 272, the rule is stated (p. 280) to be:

"Although the loss occurs by the peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. * * * If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributed to perils of of the sea (or other excepted causes) as to negligence, the plaintiff cannot recover."

The rule to be deduced from these cases would seem to be that no damages for loss of cargo could be awarded against the Plymothian, except upon affirmative proof by the cargo underwriters of negligence on her part, such as would justify a decree against her if sued alone; and heretofore no distinction has ever been made in grades of negligence to be proved in cases where her own cargo has been libelant from cases where another ship or its cargo has been libelant. As was said by this Court in The *City of Hartford and the Unit*, 97 U. S., 323, 325: "Freedom from fault is a good defense in a cause of collision, even when the suit is promoted to recover compensation for injuries received by an unoffending party."

The Court of Appeals, as we submit, lost sight of the fact that the exception of "collision" in the bills of lading changed the aspect of the cargo's case against the Plymothian. It appears to assume that the relation between

the Plymothian and her cargo remained that of common carrier instead of bailor and bailee. For example, the opinion (p. 502) says:

"We are of the opinion that the Court below did not err in the conclusion as to the error committed by the Victory, but, *in considering the right of the owners of the cargo to damages*, we cannot reach the same conclusion which he did, exempting the Plymothian from all responsibility."

Again (p. 503):

"It certainly would not be equitable to allow her [Plymothian] to go in and share on equal terms in the fund in this Court with the cargo, which certainly was in no fault whatever. *The rights of the cargo owners differ entirely from those of the two steamships. They in no way share in the faults committed; they are entitled to complete indemnity, restitutio ad integram (citing* The *Atlas*, 93 U. S., 302; The *Alabama and the Gamecock*, 92 U. S., 695; The *Virginia Ehrman and the Agnes*, 97 U. S., 316). In this instance before the Court the cargo must be paid for in full by both vessels."

At the conclusion of the opinion (p. 504) the Plymothian is required to make up a deficiency, "so that the cargo owners obtain complete indemnity."

It is evident from these passages that the Court felt it would be a hardship if the underwriters on Plymothian's cargo should have to bear a portion of their own loss because an act of Congress, in establishing a limitation of liability for the owners of the Victory, had incidentally cut off a portion of the recovery as against that vessel.

The surplus of the cargo damages not recovered from the owners of the Victory, the Court said should be imposed on the owners of the Plymothian. In doing this the Court took no account of Plymothian's plight under the same statutes. The Congress, by those acts, also took away a part of her right to recover damages for her own losses from the wrong doing Victory. In the result, therefore, Congress has imposed one class of losses on her and the Court of Appeals has saddled her with another class, notwithstanding that both classes would have been payable

in full by the Victory if the statutes of Congress had not interfered.

It is to be inferred from the opinion that if the cargo underwriters had not been in the case, but the controversy stood simply between the vessels, no fault would have been found against the Plymothian. The denial of any recovery in behalf of the Victory against the Plymothian leads to this conclusion. But, as under the exception of "collision," there could be no recovery against the Plymothian by the cargo, except upon proof of negligence, and as negligence was not found against her, as appears from the above finding, it seems that the Court did not give due weight to the effect of the collision exemption. The cases cited by the Court in support of its conclusion were not between ship and her cargo, with an exemption of "collision," and hence were not strictly in point.

They certainly are not authority for the proposition that in the present case "the rights of the cargo owners differ entirely from those of the two steamships."

In view of this exemption the case stands precisely as though the damaged cargo had been on board the Victory instead of on board the Plymothian. But in such cases this Court has held at least twice (The *Johnson*, 9 Wal., 146, 150; The *Ludvig Holberg*, 157 U. S., 60) that without such proof as would entitle the opposing vessel to a recovery, nothing could be awarded on account of her cargo.

In the *Johnson* case the cargo was in a canal boat of that name, in tow alongside of a propeller tug, and was damaged. The canal boat owner was promovent in the suit.

In the *Ludvig Holberg* the statement of the case, page 61, says, that "*the suit was promoted by the owner of the cargo of the bark*" which was struck by the steamer. The situation of the cargo was treated throughout the opinion as being precisely the same as that of the vessel in which it was carried, and although that cargo, like the cargo on the Plymothian, "certainly was in no fault whatever" (opinion, p. 563), the Court, on a finding that the tug was grievously in fault, laid down the same rule as

respects recovery by cargo bound to prove negligence, that it had often laid down as against a ship bound to prove negligence.

Mr. Justice BROWN, in delivering the opinion (at p. 70), said:

"This is one of those cases where a clear fault has been found on the part of one of the vessels, both by the District and Circuit Courts, and the findings of fact are such as to render it incumbent upon us to affirm their decree. As we said in The *City of New York*, 147 U. S., 72, 85, 'where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.'"

So here the cargo underwriters, having the burden of proof under the exception, are bound to make out some negligence on all the elements of the case against the Plymothian. It is not enough that they raise some doubt whether she might not have taken some step not taken which would have avoided the collision. It is for them to make out that she did not take some step, or make some maneuver, which by law she was bound to make (*Williamson* v. *Barrett*, 13 How., 101, 109), and certainly with that burden upon them they must, at the least, be able to point out some clear fault established by incontrovertible proofs.

The fact that under the Limitation of Liability Acts the cargo is deprived of its right to recover a part of its damages from the Victory, which ought to pay them, must be immaterial in considering the fault of the Plymothian. Obviously, it was not the intention of Congress that a portion of the damages which but for the statutes would be recoverable from one vessel should be imposed by the Court upon another if they would not have been so imposed in the absence of the statutes. The primary object was to leave the loss over and above the value of the wrongdoing vessel for limitation purposes where it might fall, unless, indeed, both were in such

fault that the cargo underwriters could have recovered the whole loss in a suit against either vessel alone (The *Ludvig Holberg*, 157 U. S., 60).

III.

Plymothian was not in fault for failing to stop and reverse earlier.

The important matters in this connection are—

(1.) The Plymothian's course and speed.

(2.) The position and course of Victory when her first two-blast signal was blown.

(3.) Whether that course was such as to involve risk of collision at or about that time, so Plymothian would have been bound to stop or reverse at once; or

(4) Whether there was room and time for Victory to correct her error, and whether Plymothian could have presumed she would do so, and hence was justified in sounding a single blast after perceiving Victory's change of heading and calling for a reply before she was required to stop and reverse; and

(5) Whether she was stopped at the collision.

1. *The Plymothian's course and speed are not involved in much doubt.*

She rounded buoy 9 less than a length off (*Henley*, 360; *Mardon*, 263; *Wood*, 238; *Lyons*, 209; *Schroder*, 202; *Hendema*, 220; *Baird*, 231; *Etheridge*, 353; *Goodwin*, 373; *J. I. Clarke*, 389; *Harrison*, 395; *J. M. Clark*, 401; *Channel*, 431).

All agree that on passing the buoy she straightened right down the channel course on the easterly side (Henley,

365, 367, 369; Mardon, 268, 273, 280; Ham, 184; Lyons, 209; Wood, 238; Baird, 231; Schroder, 203; Etheridge, 353, 354; Goodwin, 373; J. M. Clark, 402; Harrison, 395; Channel, 429; Pebworth, 424; Wynne, 404). The District Judge did not consider these primary facts in any doubt (pp. 449, 450), nor did the Court of Appeals (p. 499).

The only change either side claims she made, after straightening down the channel, was by a port helm, which put her closer to the easterly edge of the channel at collision.

She left her pier at 4 o'clock P. M., under half speed until buoy No. 9, 350 yards from the pier, was close under the starboard bow, when the engines were put full speed ahead (pp. 263, 360, 282). This was at 4.05 P. M. (p. 282). It is 767 yards from there to the collision (*vid.* Exhibit X). The tide was strong flood running with the force of two knots (pp. 37, 360, 361).

The engines were going at full speed only about 5 minutes. At 4.10 the reverse order was rung, and at about 4.14 the ship's struck (pp. 283, 163).

Plymothian's full speed was seven knots (p. 273). Starting at half speed against the tide, and having her engines at full speed against it only five minutes, it seems plain she could not have attained much speed before reversing.

On all the probabilities, and on the conflicting testimony, the District Judge found her speed over the ground was about 4 miles an hour (p 449). The Court of Appeals adopted this finding (p. 499).

2. *The Victory's position when she sounded her first two-blast signal is involved in a conflict of testimony, but, on the clear weight of the evidence, she was then to the north of Craney Island.*

This has already been discussed in part under Point I. (*ante*, p. 19).

It is clear that Victory blew two double-blast signals and a three-blast signal before the collision. No claim is made that she blew any more. Her crew's evidence is that the two-blast signals were within a half minute or a minute of each other when the steamer was half way be-

tween Craney Island and buoy 7, and that the three blasts followed a minute or so later.

Plymothian heard only one two-blast signal and the three blasts at that time. The evidence of the disinterested witnesses of both sides corroborates the Plymothian as to the signals then blown. None of them heard two double blasts, and a three-blast signal from Victory *in short succession.* All who saw or heard the first two blasts from Victory say the first signal was blown a good deal earlier and *when Victory was to the north of or about Craney Island.*

The evidence on this subject will be examined in detail.

(**a.**) In one of the Victory's answers it was alleged that she blew this signal when about 550 or 600 yards north of buoy No. 7 (p. 437). In her petition for limitation of liability (pp. 1, 2) she claims to have blown it "*soon after passing* Craney Island Light," and places the Plymothian at that time as "apparently starting down the river from opposite Lambert's Point," and the same statement is made in her answer to the Plymothian's petition (p. 319).

Nelson, pilot of the Victory, says that he blew the first two whistles to the Plymothian about half way between Craney Island Light and buoy 7 (p. 330).

Captain Elcoate says that in reply to that signal he saw steam from the Plymothian, "and about fifteen seconds after I saw steam I heard a faint sound," which he took to be the Plymothian's whistle (p. 134). Thereupon, and about a half a minute after they blew their first two, they blew two more blasts (p. 135). To the second blast he says he received no reply.

Gilbert, second officer, says: "We blew two whistles and then repeated them" (p. 64).

"Q. Was there much time elapsed between the Victory sounding her two first blasts and sounding her second two? A. No, not much time.

Q. A short time? A. Yes, sir.

Q. What interval of time was there between your first and second blasts? I mean your second set of blasts? A. Half a minute, as near as I can say. It may be more, and it may be less" (p. 72).

This witness also admits having seen steam coming from the Plymothian's pipe between the time the Victory blew her two blasts, although he heard no sound (p. 64).

Pilot Nelson claims that the second two blasts were blown about a minute after the first two (p. 330).

(**b**.) It is apparent from this testimony, if true, that the Victory blew two blasts twice close together. The Plymothian's evidence shows that she heard but one of them. But whether it was the first or the second (if two were then blown) cannot be definitely ascertained from the evidence. If the Victory blew two blasts twice with a short interval between, as she claims, it seems obvious that one of them overlapped a whistle from the Plymothian. Her first two blasts may have overlapped the Plymothian's one blast, or her last two may have been overlapped by the Plymothian's danger signals.

(**c**.) It is most significant that, while a number of disinterested witnesses in the case, some called by the *Plymothian*, prove that the *Victory* did blow a two-blast signal twice, none called on either side corroborates the *Victory's* story that the two double blasts were blown so close together, and were followed by a signal of three blasts.

J. I. Clark, captain of the tug *Mary and Joe*, who was standing on Lambert's Point pier (p. 388), says that the Plymothian blew one blast just after passing buoy No. 9, that the Victory answered it with two (p. 388), which he heard (390), the Victory at the time she blew hers being "about at Craney Island Light" (pp. 392, 393). The vessels were then a good mile apart. Later, he says the Plymothian blew another one whistle; he heard the Victory reply with two, to which the Plymothian at once answered with three, followed a little later by three from the Victory (p. 390). He says the Victory was a mile off when she blew her first two (p. 392). He saw the steam of the whistle (p. 393).

J. M. Clark, captain of the tug *Pioneer* (p. 400) says that the Plymothian when about a hundred yards below buoy 9 blew one blast on her whistle, to which the Vic-

tory answered with two. "I could see the whistle from the pilot house" (p. 400). He then went out of the pilot house and walked aft to the engine-room, spoke to the engineer, who came out, and both were standing on the stern of the boat when the Plymothian blew again, her whistle being answered by two from the Victory (p. 401). He also says the *Victory* was in the neighborhood of Craney Island Light at the first cross-signal (p. 401).

Goodwin, captain of the tug *Commodore* (p. 372) says that when the Plymothian was at buoy No. 9 (p. 373) the *Victory* was very little to the south of Craney Island (p. 378); that the Plymothian blew one whistle just as she rounded buoy No. 9 (p. 373). He saw the steam of two whistles in reply from the Victory, but did not hear them (pp. 374, 383). The Plymothian blew again a little while later, the Victory replied with two, which he heard (p. 374). He says the Victory was about a hundred yards south of Craney Island when the first whistles were exchanged (p. 383). He says also that only a few seconds elapsed between Victory's two signals (p. 379) but as he did not hear her danger signal (p. 379), it seems probable that this was what he heard soon after the first signal that he saw.

Etheridge, mate of the Commodore, heard the Victory blow a single blast, to which he heard no reply, afterwards heard her blow again, and heard a two-blast signal in reply. The Plymothian then blew three, and reversed (pp. 353, 355).

Wigham, a witness for the Victory, who was stationed on the *Princess*, at anchor opposite Lambert's Point, says he heard two blasts from the Victory repeated, but heard no other signals from her (p. 23). What he took for the repetition of the two-blast signal was probably the Victory's three-blast danger signal. It seems probable that he did not hear her first two blasts.

Swain, also for the Victory, a witness from the barge *Storm King*, at anchor off Lambert's Point, only heard one signal of two blasts from Craney Island way (p. 393).

Pratt, captain of the tug *Wanderer*, a witness for the Victory, was out on the western side of the channel,

watching and waiting for the Victory with her mail. He only heard her two blasts once (p. 306).

It is remarkable that these witnesses, all of whom were in the near neighborhood of the Plymothian should have failed to hear a two-blast signal from the Victory repeated and followed by three blasts from her, if they were blown close together as alleged. The evidence of those who heard two double blast signals from the Victory shows that a considerable interval elapsed between the two. The fact that others did not hear two at all, but heard only one two-blast signal shortly before the collision, is most persuasive evidence that she did not blow two others at or about that time; but if she did it seems that one of them must have been overlapped by whistles from the Plymothian. The evidence of all these witnesses accords with that from the Plymothian that only one signal of two blasts, and the signal of three blasts could be heard by witnesses in her neighborhood at the time the Victory claims she repeated a two-blast signal and followed it up with three.

(**d.**) In addition to the evidence of J. I. Clark (pp. 392, 393), of J. M. Clark (p. 401), of Goodwin (pp. 374, 383), that the Victory's first two blasts were blown when she was near Craney Island Light, we have the evidence of Captain Wynne, on the tug *Lumberman*, who was coming out of Tanner's Creek, about half a mile to the eastward of Craney Island, whose position was nearly abreast the Victory as she was coming up the channel to the northward of Craney Island Light (p. 404). He was in the best position to locate her in the channel when she blew this first signal. He saw the Plymothian leave her dock, and saw that the Victory was then below Craney Island (p. 404). When the Plymothian was in the channel, about three or four hundred yards from the pier (pp. 404, 407), he noticed that she blew one blast, and that two or three minutes later the Victory blew two (p. 404). When the Victory blew this first signal of two blasts he says she was still *below the lighthouse* (p. 409).

(e.) We also have the evidence from the Victory herself, Candlish (p. 34); Elcoate (p. 132), that she did blow two whistles just below Craney Island. They claim, however, that these whistles were blown as passing signals to river steamers; but witnesses from two of the river steamers were produced, who proved that they passed the Victory port to port, instead of starboard to starboard; and the District Court so found. Hence, as she could not have blown the two-blast signals for these river boats. A fair conclusion from the evidence seems to be that her first two-blast signal was blown when she was below or near Craney Island lighthouse, and that she did not blow a repeated signal of two blasts at the time she says she did.

(f.) The time when the Victory's first whistles were blown, is definitely fixed by circumstances mentioned by both pilots, which effectually contradict Nelson's statement that he blew it half way between Craney Island and the buoy. Nelson testified (p. 340):

"Q. You saw this steam from the whistle between the time you blew your first set of whistles and the time you blew your second set of whistles? * * * A. Yes, sir.

"Q. And they were about two minutes apart? A. Hardly that, not more than two.

"Q. Between your two signals? A. Yes, sir.

"Q. When did you first observe her, as you say, port her helm? A. *She straightened down a few minutes* and then ported her helm just below the Merrimac (No. 22), buoy. *I blew two whistles before he straightened down.*

"Q. *You blew two whistle before he straightened down?*

A. *Just about the time he straightened down, I should have said.*"

He also testified to Plymothian's position when she straightened down the channel (p. 342):

"Q. You noticed when she came out [from the pier] and got about mid-channel, she hung in mid-channel some time, and then she went to the eastern side? A. Yes, sir.

"Q. You don't desire to correct that in any way? A. No, sir.

"Q. And as for the period she was hanging in mid-channel, it may have been a minute or two? A. Going down, sir.

"Q. Hanging down the mid-channel? A. Yes, sir.
"Q. And that was about one or two minutes? A. Yes, sir; I suppose so."

Thus we have Nelson's own statement that he blew his first signal *before* Plymothian straightened down opposite Lambert's Point; and the evidence demonstrates that Victory was then to the north of Craney Island.

Pilot Henley also shows that at the time he was straightening down the channel by buoy 9 the Victory had not made the turn to westward called for by the conformation of the channel at Craney Island (Nelson, p. 339 and chart).

He says (pp. 360, 361):

"Just as I passed the buoy and straightened up for the channel, I sung out "Steady," and I saw this Victory coming up just ahead a little on the port bow, and I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm, so that I could see the whole port side of his ship and the round of his stern, and I went along a few minutes."

He testifies as to the position of the Victory at the time Plymothian passed buoy 9 (p. 365):

"Q. You say when you passed from Lambert's Point, you passed close to No. 9 buoy? A. Yes, sir. * * *
"Q. The buoy was then to the east of you at that time? At that moment where was the Victory? A. Coming up somewhere just *below* Craney Island Light.
"Q. She had passed Craney Island Light? A. No, sir.
"Q. Hadn't passed Craney Island Light? A. No, sir."

It is thus determined with reasonable certainty, on the evidence of the two pilots, that the Victory's first two-blast signal was blown before she passed Craney Island. Not only were the vessels so far apart at that

time that the Plymothian would not have been bound to stop if she had heard a signal, but as there were at least two river steamboats between the vessels at that time, her pilot might well have supposed that the Victory's two blasts, if blown, were intended for one of them, rather than for him.

(g.) However the Court may view this conflict of proofs if it finds the first two blasts were blown when the Victory was below Craney Island, a mile and an eighth away, it was certainly no fault on the part of the Plymothian contributing to the collision that she failed to hear that signal, which was not then, nor for some time afterwards, followed by any change of course; while, if it finds the two-blast signal was repeated within a half minute, it seems a fair conclusion, from the testimony, that one of them was overlapped by the whistle of the Plymothian. As Plymothian acted immediately and effectively on hearing the one she did hear, and succeeded after that in stopping her headway, it was not really material that she did not hear the other.

The cargo underwriters, therefore, must point out some risk of collision after the Victory passed Craney Island, which determined the duty of the Plymothian to take precautions to avoid a collision. But such risk first appeared when the Victory starboarded as testified to by the Plymothian's witnesses, and immediately on perceiving that, she took the required precautions, and thereby absolved herself from all blame.

3. *The Victory's course was along mid-channel or to the west of it and was not such as to involve risk of collision until she made a change to port as under a starboard helm, just before sounding the two-blast signal that Plymothian heard.*

On this point the District Judge made no express finding. He says the Victory "moved after or from the time of Craney Island light on or to the eastern side of the channel under a starboard helm" (p. 449). The Court of Appeals' opinion implies that there was no change by Vic-

tory, but a gradual straignt approach to the point of collision. "Victory was seen * * * opposite to Craney Island light, a mile and an eighth off, under a starboard helm; she was about mid channel, or perhaps to the eastward of mid-channel. * * * They kept their respective courses *without change* until the collision became imminent, indeed inevitable, when each reversed," &c. (p. 499).

We submit that this finding is against the clear weight of the evidence; that no witness except Victory's crew says she was under a starboard helm at Craney Island; that if she had been, and had kept her course "without change" she would have been ashore at least a quarter of a mile northward of the place of collision; that in fact she ported her helm at Craney Island, heading up S. ½ W., which would not take her to the place of collision, and that she got there by starboarding when only three or four lengths away.

(**a.**) The testimony of the Plymothian's officers and crew was unanimous that the Victory was on their port bow all the way up from below Craney Island to the point where she changed her course to port just before blowing a two-blast signal.

Lyons, wheelman, who was on the lower bridge with the compass before him, says that at the time she blew her two blasts she was about a half or three-quarters of a point on the port bow (p. 210).

Wood, second officer, who was on the after deck just by the No. 4 hatch when he first saw the Victory, just after the Plymothian passed buoy 9, says, "She was on my port side. I saw her over my port side" (p. 239).

Hendema, socond wheelman of the Plymothian, says that at the time the Plymothian's alarm whistles were sounded and her helm ordered hard-a-port, the Victory was about a point or a point and a quarter on their port bow (p. 221).

Baird, A. B., who was on the after hatch coiling down rope (p. 230), says that he heard three single blasts from his own vessel, and afterwards a danger signal of three blasts, and that just after he heard the single whistles

he looked forward and saw the Victory a shade on the Plymothian's port bow (pp. 231, 236).

Schroder, steward, who was in the neighborhood of the No. 3 hatch (p. 202), and passing from one side to the other (p. 203), says that after hearing three whistles on his vessel he looked forward, and that the Victory at that time seemed to be about ahead, "throwing over on the same side we were on" (p. 203). This necessarily implies that she was coming from the other side.

Captain Mardon testifies that after he had rounded buoy 9 and steadied the helm down the channel the Victory was somewhere about Craney Island and on his port bow. He also says that his ship must have been bearing on their port bow (p. 264). "She was coming up, as near as I can say, about mid-channel, with our port sides open on each other—a little on our port bow. * * * That's the situation of the two ships after we rounded No. 9 buoy. The Victory was a little on our port bow all the time. * * * I don't know exactly how many points she was. I could see the side. We didn't take the bearing by the compass in that case. A seaman can see a ship, whether he is going to clear her or not. * * * She was on the port bow all the time. * * * She was coming up about the same until we heard her two whistles and saw her starboard her helm."

(P. 270.) "Q. She was coming up mid-channel then all the time until you got the two whistles? A. Yes, sir.

Q. And at that time she starboarded? A. Yes, sir, and went across the channel.

Q. And those two whistles were given after you sounded the third whistle? A. After we sounded the third of our single blasts. As soon as the two whistles were blown we sounded our danger signal and put our ship full speed astern" (p. 271).

Pilot Henley says: "Just as I passed the buoy" (No. 9), "and straightened up for the channel, I sung out 'steady,' and I saw this Victory coming up just ahead a little on the port bow; and I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm, so

that I could see the whole port side of his ship and the round of his stern,* and I went on a few minutes. All at once the captain said: 'Pilot, what is that fellow doing?' And I blew one whistle again, and he answered with two, and I immediately blew the danger signals and reversed the ship full speed. * * *

Q. What should you think he did with his helm when he gave you the two whistles? A. Starboarded his helm and came right into us. He was on my port bow, with his port bow showing to me, and when he starboarded his helm was the time I blew my whistle, and he blew two whistles, and I gave the danger signals immediately, and reversed the ship (pp. 360, 361).

Q. How long did you proceed *before* you blew your third signal whistle? A. As I said, when I blew that (second) he gave me no response, but ported his helm and showed me the whole port side of the ship, leading me to suppose he understood.

Q. You blew the second signal and got no response, and then saw he was altering his course? A. He ported.

Q. He in the meantime had ported and was showing you the round of his stern*? A. Yes, sir.

Q. And you were approaching port to port and all was clear? A. Yes, sir; all was perfectly clear.

Q. Then it was you saw him alter his course? A. About three minutes after that.

Q. And then you blew your third whistle? A. And got a cross signal from him.

Q. When he was altering his course then how was he coming? A. He starboarded a little for me, *but didn't come up straight for me*, and as I saw him altering his

* It seems apparent that the Victory at this time was making the bend to westward in the channel required by the red buoy just to the north of Craney Island (Nelson, p. 339). The change of course of the channel there is about one and a half points. In straightening up the channel, the Victory evidently must have headed well to the westerly side, in order to show "the whole port side of his ship and the round of his stern" to Pilot Henley. Her witnesses admit they were steering straight up the channel after passing Craney Island, heading S. ¼ W. (pp. 332, 335). This carries with it a necessary admission that their helm was ported at Craney Island (the channel course below being S. by E. *vid* chart), and that the vessels on a heading by Victory of S. ¼ W. must have been port to port.

course I blew him a signal, and he blew two whistles, and I blew the danger signal and reversed the ship" (p. 363).

He judges the Victory was from seven to nine hundred feet away when she starboarded and blew the danger signals (p. 361).

Prior to the starboarding, just before the two blasts were blown, the Victory, he says, was about mid-channel, and had been there all the way up from lighthouse (pp. 366, 367, 368).

(**b.**) The foregoing evidence is strongly corroborated by the disinterested witnesses.

At or about Craney Island the Victory was clearly not further east than mid-channel, and was probably close to the westerly edge. Both pilots place her at mid-channel (Nelson, pp. 335, 336; Henley, p. 366).

Captain Mardon, in his answer to the first libel, filed Dec. 3, 1891, placed the Victory at the same point (p. 443). But witnesses who were themselves on the westerly side of the channel, or closer to the Victory, say she was nearer the westerly bank.

Brown, the Craney Island lighthouse keeper, says that she passed close to the west bank. "She came as close up to the lighthouse as she could to keep afloat, and I thought too close" (p. 346; also pp. 348, 349).

Harnay, captain of the steamboat *Luray*, says he passed the Victory just after passing Craney Island.

"Q. And how did you pass the Victory? A. I presume she was about in the middle of the channel, might have been a little on the starboard side. By my leaving her on the port, I judged she must have been just a little might on the starboard side of the channel coming up.

Q. On *her* starboard side of the channel? A Yes, sir (p. 423).

Etheridge, mate of the *Commodore*, says:

"I just saw the Victory coming up the river, and we went out to meet her in order to get a tow. * * *

Q. What speed was she making? A. I suppose at the least calculation eight or ten miles an hour.

Q. What part of the channel was she moving in? A.

As near midship channel as she could get. I mean the middle of the river" (p. 354).

Goodwin, captain of the same tug, says:

"Q. How was he [Victory] in respect to the channel when he passed Craney Island? Was he on the middle, or on the east, or west? A. He was on the west side.

Q. When he blew the first time the blasts, you did not hear" (saw steam); "how was it? A. On the west side.

Q. How was he when he blew the second blasts of two whistles? A. Coming up then, about middle way.

Q. Directing his course to port under a starboad helm? A. Yes, sir.

Q. Then he kept straight ahead to the scene of the collision at buoy 7? A. Yes, sir.

Q That is on the eastern edge of the ship channel? A. Yes, sir" (p. 355).

Harrison, engineer of the *Pioneer*, who was called out of the engine-room by his captain at the time the last cross signals were blown (p. 394), says:

"Q. When you looked at the Victory then, was she to the east or to the west of the Plymothian? A. To the west; coming up on the west bow of the Plymothian. * * *

Q. Did you see the Victory over the right hand side of the Plymothian, or the left hand side of the Plymothian? A. When? After they blew the cross signals?

Q. When they blew the first cross whistles that you heard? A. Yes; the Victory was on the west side" (p. 398).

"Q. In looking down from where you were, you could see the first black buoy below the pier? A. Yes, sir; plain enough.

Q. How did the Victory look with reference to that buoy, as well as you remember, at the time they exchanged those cross signals that you heard? A. She was out pretty near the middle of the channel, from the best I could give you" (p. 399).

The evidence of mate Channell, of the steamboat *Olive*, is most persuasive on this point. He was in the habit of going up and down Elizabeth River with his boat every day of his life. He says he passed the Plymothian just as she came out of the dock, leaving her on the starboard side. He passed between the boats, leaving the Ply-

mothian on his starboard quarter as he went down, and passing the Victory port to port (p. 428).

"Q. What position did she occupy in the channel, the west, middle or east side? A. She looked to me she was just about as close on Craney Island as she ought to have been" (pp. 428, 429).

He thought he passed the Victory at about Craney Island Light, but did not profess to remember exactly about that (p. 428). But as he passed the Plymothian about "as she came out of the dock," and as he was only about a quarter of a mile below Craney Island, turning the buoy to go off on the Flats, at the time of the collision (p. 481) it is apparent that he must have passed the Victory some little distance to the south of the lighthouse.

(**c**.) That Victory made no changes to port until she starboarded about the time her cross signal was heard finds ample confirmation in the evidence from the Victory's deck.

Pilot Nelson admits that he was on the west side of the channel prior to meeting the steamers (p. 335). He does not distinctly state that he made any change of helm on account of the river steamers; whilst on that subject, Captain Elcoate says:

"Q. *Did you have to change your helm for any of those three river steamers?* A. *No, sir*" (p. 152).

It is proved that two of the river steamers passed the Victory port to port and that she was then on the westerly side of the channel (pp. 428, 429, 433). To the same effect, Brown (p. 346).

Nelson says there is a turn in the channel to westward (by port helm) at Craney Island (pp. 335, 339), and he admits having conformed his course to that of the channel, after passing the lighthouse. The general course is south ½ west from Craney Island up (p. 335), and he says that his ship was heading about S. ½ W. (p. 332). He "*kept a straight line up the channel*" after he saw the Plymothian (p. 135), and makes no mention of an actual change of *helm* until he starboarded for two schooners (p. 337). If heading up

properly at Craney Island, he says he would have had to starboard ½ to ¾ of a point to get on the eastern side of the channel and that he did this prior to the collision (p. 339); but a careful reading of his whole evidence, with that of Victory's officers, will show that the change was made very shortly before the collision.

Elcoate says that a short while before stopping his ship the wheel had been starboarded, and subsequently steadied, but the ship was not put back on her previous course before it was steadied (p. 137). He mentions no starboarding until they met the second schooner, which, he says, was astern of him when he ordered his engines reversed, and was going down the channel only a ship's length ahead of the third schooner (p. 147). The latter it is claimed was abreast the vessels at the time of the collision (pp. 333, 57, 69.)

Candlish, mate, testifies they were coming up a pretty fair channel course, keeping right up the line (p. 35) until they starboarded for the first schooner (pp. 37, 47). He admits that both the schooners were sailing up straight in mid-channel (pp. 34, 47). He mentions no starboarding until he reached the schooners. He says they starboarded for the first schooner, about a point (p. 47), and then steadied (p. 37), (making no mention of going back to their original course), and that they also starboarded for the second schooner (pp. 34, 47).

On the question as to where the schooners were met, Candlish agrees with Captain Elcoate that the first schooner was only about a ship's length astern of the Victory at the time of the collision (p. 58) and the second schooner was about abeam at the collision (pp. 57, 58).

Gilbert, the second officer, who was at the wheel, says that between Craney Island Light and the collision the helm was amidships, until he starboarded to avoid two schooners, and that he then steadied it again (pp. 62, 63) without going back to his previous course (p. 78). When he first saw the Plymothian, he says Victory was *heading straight up the channel*, parallel with it. One of the schooners, he says, was on the Victory's starboard at collision, and the other one was about abreast of her (p. 66). He agrees that the schooners were

in line in mid-channel, and says that his ship passed them about 100 feet off (pp. 70, 80), agreeing substantially with Candlish, who says he passed the second about 30 yards off (p. 54). Gilbert says he starboarded ½ a point for the first schooner, and ½ for the second, and steadied each time without going back (p. 78), and that after thus starboarding, the ship was headed about for buoy No. 7, the point of collision (p 78).

He further admits starboarding for the *last* schooner (p. 78).

"Q. Had you starboarded for any of those schooners? A. Yes, sir.

"Q. Which one? A. *All of them.*"

The amount of the starboarding for the last is not given, but conceding 1 point for the first schooner (p. 47), ½ point for the second (p. 78), and something more for the third, enough starboarding by Victory is seen to account for the swing shortly before collision as testified by those on board the Plymothian.

Candlish went on the forecastle head about the time the danger signals were blown, and was looking right over the stem until collision. He says Victory was then heading straight for Lambert's Point Lighthouse (pp. 38, 44), the helm being amidships (pp. 63, 137, 154).

The fact that the Victory was so heading is also testified to by Martin and Page (pp. 320, 315), who stood by the lighthouse on the pier.

It will be seen from chart Exhibit X (Appendix) that a line drawn from Lambert's Point Lighthouse across buoy No. 7, the place of collision, and extended would touch mid-channel, 350 yards from the buoy. If Victory was on that course, as alleged, it is plain that she was as far west as mid-channel when three lengths from the place of collision.

The testimony as to what vessels were met with by the Victory, and where each was met, has already been adverted to (*ante*, pp. 34, 35, 59). It seems clear that the schooners for which the Victory starboarded, and which were the first vessels for which she did starboard, were

encountered not far from the place of collision; that the starboarding for each of them, and the hard-starboarding which it is admitted was done after the reversal of her engines, accounts for the rank sheer to port observed by those on the Plymothian at the time they took precautions for safety.

It is admitted the first two schooners were in mid-channel (Candlish, pp. 34, 47; Gilbert, pp. 70, 71, 80; Elcoate, p. 146), and that the Victory passed the second schooner about one hundred feet off (Elcoate, p. 133; Gilbert, pp. 70, 80).

The channel being at that point at least a thousand feet wide, the Victory, on her own showing, was then more than four hundred feet west of the line of buoys 7 and 9. Taking the further statement of her witnesses as true, that this second schooner was not more than a ship's length astern of them at the collision (Candlish, p. 58; Gilbert, p. 66; Elcoate, p. 147), we determine positively on their own showing that the Victory herself was about mid-channel when about three lengths away from the place of collision.

This is also to be inferred not only from the evidence that for some time prior to the collision she was heading on a line passing through buoy 7 to the lighthouse on Lambert's Point pier (pp. 38, 44, 320, 315),—a line which would touch mid-channel three hundred and fifty yards from the buoy—but also from Elcoate's evidence that his helm was amidships when his two double blast signals and his three blast signal are alleged to have been blown, and continued amidships until he reversed the engines (p. 154; also Candlish, p. 63). The only conclusion to be drawn from this testimony as to the helm is that the starboarding which put the vessel on a course heading through buoy 7 to the lighthouse at the end of Lambert's Point pier was completed and the helm steadied before Elcoate blew any of his alleged signals, and that course, as before stated, worked backwards, leads across mid-channel three hundred and fifty yards from the buoy.

Victory's witnesses sought to account for this heading at collision, by claiming that when they began to reverse, the tide canted the stern of their vessel out into the channel, and her bow in towards buoy 7. This, however, is an

obvious impossibility. As the power which would draw the vessel back against the tide, on a reversal of the engines, was at the stern of the ship, against which the tide was running, the effect of reversing obviously would be to hold that end of the ship up, whilst the bow being free to swing, would tend to go over, to the tide line, instead of athwart it. The tendency would plainly be for her keel line to conform to the tide line as soon as the reversed actions of the engines was felt. The action of the propeller in such case would be the same as a string attached to the end of a long stick, held up against the current of a brook.

4. *The Plymothian was justified in presuming the Victory would pass port to port until some contrary sign appeared which produced an actual risk of collision.*

"Rules of navigation," as was said by this Court in The *Johnson*, 9 Wall., 146, 152, "are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and they continue to be obligatory as the vessels advance, so long as the means and opportunity to avoid the danger remain. They are not strictly applied to a vessel which is otherwise without fault, in cases where proximity of vessels is so close that collision is inevitable, and they are wholly inapplicable when the vessels are so distant from each other that measures of precaution have not become necessary to prevent a collision."

When these vessels were as far apart as buoy 9 and Craney Island they were in no risk of collision, and the only rule then applicable to them was that each should keep to its own starboard side of the channel, so as to avoid any risk as they came nearer. Each was entitled to presume that the other would act lawfully; would keep to its own side; if temporarily crowded out of her proper course would return to it as soon as possible; and that each would pursue the customary track of vessels in the channel, regulating its action so as to avoid danger rather than to incur it (The *Servia*, 149, U. S., 144; The *City of New York*, 147 U. S., 72; The *Josephine*, 20 U. S. App.,

105. The *Harrisburg*, 9 Fed. Rep., 169. The *Free State*, 91 U. S., 200. The *Bridgeport*, 6 Blatchf., 3. The *Nessmore*, 41 Fed. Rep , 437. The *Northfield*, 154 U. S., 629, 630. The *Delaware*, 161 U. S., 469).

Prior to the starboarding by the Victory, at or about the time she blew the two-blast signal that was heard on the Plymothian, there was no risk of collision between the vessels under the rules laid down in the foregoing cases. Up to that time, whether she had been in the westerly part of the channel, or in mid channel, or even slightly to the east of mid-channel, she had always been on the Plymothian's port bow and so heading that the vessels would pass port to port. There was no obligation on Plymothian to take any precautions under Rule 21, although the reduced speed at which she was proceeding against the tide was equivalent to a "slackening" within the meaning of that rule. She was not bound to do any more, for until then the Victory appeared to intend to keep on her right course and pass port to port.

In The *Free State*, 91 U. S., 200, 205, Mr. Justice HUNT, delivering the opinion, dealt with this point as applied to channels as follows:

"The appellants insist that the rule of law is this: that where a steam vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is bound to slacken her speed, or stop and reverse. We have examined with care the authorities cited by the appellants, but we find none that sustains this proposition. The rule is otherwise.

"If two steamers are meeting each other end on, or nearly so, where there is plenty of sea room, and at a considerable distance from each other, it is not the duty of either to stop, reverse or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case. The risk of collision is not present under such circumstances."

So long as the vessels were port to port the Plymothian proceeding at moderate speed, was not bound to stop or reverse, against the chance that the other vessel might

depart from the rules of navigation. So long as she was not seen to be departing from them, the Plymothian was not in fault for keeping on (The *Adriatic*, 107 U. S., 512; The *Jesmond*, 4 P. C., 1; The *John King*, 1 U. S. App., 60).

It is not shown that any earlier reversing on her part would have averted the disaster. All the Court of Appeals says is that "*it might have been prevented.*" The real question is, was she bound to stop earlier?

5. *The Plymothian would not have been bound to stop and reverse at once if she had heard a prior two-blast signal from the Victory at the time she claims to have blown it.*

Plymothian was under reduced speed, equivalent to a slackening under Rule 21; no risk of collision would have been involved at that distance (900 yards), and she might have relied on her repeated single blast to correct the Victory's error until it became apparent from a further answering cross-signal, or from a change of heading, that she was persisting in her error.

The case is similar in its main features to that of The *Stephanotis and the Horton*, decided by the Court of Appeals in England, July 24, 1894, reported in the *Shipping Gazette and Lloyd's List*, July 26, 1894 (printed in full in Appendix to this Brief, p. 27).

In that case, the collision occurred in the River Tyne. The case for the *Stephanotis* was that she was bound up, keeping to the north side of the navigable channel, at moderate speed, in a snow storm, when the *Horton* was observed about 250 yards off, also on the north side of the river, in such position as to make it impracticable for the *Stephanotis* to pass up between the *Horton* and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the *Horton* which was seen to be approaching as if under a port helm. The *Stephanotis* came ahead, helm astarboard, her engines going full speed ahead, as the only means of avoiding a collision.

The case for the *Horton* was that she was keeping to

the south of mid-channel going down the river at the rate of about four knots. The *Stephanotis* was seen coming up the river about half a mile away, bearing right ahead. The *Stephanotis* thereupon blew one blast, to which the *Horton* responded with one blast, and then ported and steadied her helm. When the vessels were in a position to pass clear port to port the *Stephanotis* blew two short blasts, and the *Horton*, *after replying with one short blast*, again slightly ported her helm. The *Stephanotis*, however, blew two more blasts, and, as she was then seen to be under a starboard helm, the *Horton's* whistle was blown a short blast, and her engines were set full speed astern, but the *Stephanotis* struck the *Horton*, doing her great damage.

The Master of the Rolls (Lord ESHER), in giving judgment, said:

The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the *Stephanotis* to have ported after the *Horton* blew one blast, and that the master of the *Horton* might reasonably have expected that he would do so. When the master or pilot of the *Horton* heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, *he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm to port, or to have ceased starboarding, and then they would have gone clear*. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the *Horton* to have stopped or reversed, or stopped even, at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the *Horton*, but must have been for some other reason, and that the master and pilot of the *Horton* might reasonably have supposed that when, if anybody had looked, they must have seen the *Horton*, and must have known that the *Horton* was porting—they had a right to suppose that the *Stephanotis* would stop starboarding immediately, and would have ported her helm.

If so it was not unreasonable and unseamanlike, I think, for the *Horton* to keep on as she did. By the time that two ship's lengths were passed over by the two vessels approaching each other—that is the time of the second blast—the collision was inevitable. It seems to me that the judgment of the President, and the advice of his Trinity Masters, was too severe. It was requiring men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the *Stephanotis* ought to be held solely to blame.

Lord Justice A. L. SMITH: There can be no doubt in this case that those in charge of the *Stephanotis* were to blame. Nobody says they were not. The learned Judge says they were, and there is no appeal against that finding. But it is said that those in command of the *Horton* are also guilty of neglect, and guilty of faulty and bad seamanship in not stopping and reversing at an earlier period. It is said that when those on board the *Horton* heard the first two blasts which came from the *Stephanotis*, the captain and those in charge of the *Horton* should then and there have made up their mind that the *Stephanotis* was going to perform the act which she did. The nautical assessors advise us that if the *Stephanotis* had not persisted in the maneuver that she did persist in, and had gone back to port helm, everything would have gone well. Therefore, in my judgment, there is no negligence on the part of the *Horton* in not having made up her mind instantly that the *Stephanotis* was going to act as she did. In my judgment it has not been made out that the *Horton* has been guilty of negligence, and, therefore, the *Stephanotis* should be held solely to blame.

In The *Florence* (68 Fed. Rep., 940, 942), where fault was charged against the *Florence* for not stopping immediately because a two-blast signal was blown to her, and for answering it with a single blast and keeping on, the court held that this was no fault as there was time for the other vessel to correct her error and perform her legal duty. The argument made by the cargo in this case that if the Plymothian had heard a prior two blast signal she should have stopped earlier than she did, was there answered. BROWN, *J*, said (p. 492):

"I do not perceive that the *Florence* is chargeable with fault contributing to the collision. It is true that her master testifies that if he had observed the long whistle

of the *Eldorado* while he was slowed up for the *Peene* to pass ahead of her, he would not have gone ahead full speed, but would have waited to let the *Eldorado* also go ahead of him. This, however, would have been a voluntary concession. It was not obligatory. But he did not observe the *Eldorado's* long whistle because preoccupied probably with the navigation of the *Peene*. The failure to hear the *Eldorado's* whistles was not, however, a contributing cause of the collision, because it did not mislead the *Eldorado*, nor give her the least apparent right to go ahead of the *Florence*. It was practically equivalent to an express dissent, because the *Eldorado* had no right to go ahead without an express assent of the *Florence*. * * * *When the Florence gave the Eldorado a signal of one whistle there was abundant time for the Eldorado to keep away by reversing, and the Florence had a right to expect her to do so.*"

The suggestion so strenuously urged by the underwriter's counsel that Captain Mardon *would* have stopped earlier if he had heard a prior cross signal ignores the real point. The question is, would he have been bound to stop?

In *Williamson* v. *Barrett*, 13 How., 101, 109, Mr. Justice McLean, in delivering the opinion of the Court, dealt with a similar suggestion:

"Before, however, any such instruction" [that a vessel should have reversed in addition to stopping] "could be properly claimed," he said, "the defendants must have made out a state of the case to which it was applicable, and from which the omission to make the movement laid a foundation for the inference of fault on the part of the *Major Barbour*. The fact that it would have prevented the catastrophe is not enough; circumstances must be shown that would make it the duty of the master to give the order. There is no rule of law, or of the river, that imposes upon him, in such an emergency, the obligation to give a particular direction to his vessel, simply because it might avoid the danger. The question in all such cases is, whether, in the exercise of due care and caution in the management of her at the time in any given case, such a direction should have been given."

(**6**) *No fault on the part of the Plymothian has been established, nor indeed alleged, under Inspectors' Rule 3.*

This rule provides that, "if, when steamers are approaching each other, the pilot of either vessel fails to understand

the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

In bringing this rule into the recent act of Congress providing a code for inland waters, it has been altered so as to read:

"Rule 3. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

This leaves out the part of it which made fault depend upon a tape line measurement.

(**a.**) It is to be noticed that the fault under this rule was not specifically alleged, either in the pleadings of the Victory or in those of the cargo.

The fault alleged by the Victory was "in not promptly stopping and backing" (pp. 2, 19). That of the cargo (pp. 7, 17) was "in that she did not, when the Victory failed to reply to their signal, or, at any rate, when the Victory gave the signal of two blasts, indicating that she was proposing to go to the eastern side of the channel, instantly stop and reverse."

It is not charged in either case that the Plymothian received any cross signal when "within a half mile" of the other vessel except the one received at the time she stopped and reversed; nor is it alleged that her pilot "failed to understand the course or intention of the other" or was "in doubt" about it. If the earlier signal was given at Craney Island, as seems to have been the case, the vessels were then a mile and an eighth apart. If it was given when half way between buoy 7 and Craney Island, it was given when she was 600 yards from buoy 7, and, as at

that time the Plymothian must have been at least 300 yards below Buoy 7, the distance between the vessels would be 900 yards, or more than half a mile, as the District Judge found (p. 455). If that was not the signal the Plymothian heard and acted on, there must have been a second one; and, as on the Victory's own evidence, that was blown within half a minute or a minute afterwards, and as the Plymothian immediately did more than was required by Rule 3, in that she immediately reversed and went full speed astern, it is evident that she was guilty of no fault under this rule. Neither of the lower Courts has found that she was.

The Court of Appeals for the First Circuit declined to find a vessel in fault for a violation of one of the Inspectors' rules where there was no specific allegation of such fault in the libel (*Towboat No.* 1, 76 Fed. Rep., 906, 909).

(**7.**) *The headway of the Plymothian was completely stopped at the collision.*

Her full speed was about 7 knots (p. 273), but on this occasion, prior to reversing, was about 4 to 4½ knots, the tide being against her with a force of about 2 knots (pp. 27, 360, 361). At full speed she would probably have stopped in about four times her length, and in about three minutes.

The testimony of her third engineer that she could stop in a minute, is clearly only an estimate, so plainly erroneous, when compared with the actual experiments of experts on vessels of different size, as to be entitled to no weight (The *Normandie*, 43 Fed., 151, 159, *note*). Proceeding at her speed, against tide, it seems probable that she would have stopped in from two and a half to three minutes.

After making slight allowances for errors in recording time in the engine-room, it seems that her engines were ordered astern between three and four minutes before the collision (p. 282). Allowing for putting the engines over, and for their slow backward movement when first reversed, it is certain the engines must have been going astern between two and three minutes before collision.

This would be sufficient not only to stop her headway against the tide, but to give her some sternway, and it is testified by some of the witnesses that she had sternway when struck.

This is also indicated by the fact that buoy 7, which had been slightly overlapped by the starboard bow, prior to collision, was around on the port bow after the blow was received, and had crossed in front of the stem (pp. 40, 50, 161, 220, 274, 275, 338).

The Victory contends that the Plymothian could not have been stopped, because some part of her side and beams was found on the Victory's 'tween-deck, but it has been testified that if the Plymothian had been under way the after edge of the cut in her side, as shown on the photograph on file, would have been less straight (p. 414). The argument based on this piece of iron is insufficient to overcome the clear preponderance of evidence to the contrary.

A similar argument was addressed to the Court in the case of The *Luckenbach*, 8 U. S. App., 9. MORRIS, *J.*, in delivering the opinion of the Court said:

"The appellants contend that the direction of the cut into the tug's bow shows that the tug, at the time of collision, had stopped, and that the *Georgia* was going ahead, and therefore had not promptly reversed; but the direct proof is too strong to be overcome by inferences drawn from the testimony on that subject. The immediate and primary cause of the collision was the imprudent speed of the tug and her want of caution in rounding Town Point so close to the wharves. The burden is upon her to establish some fault or neglect on the part of the *Georgia* contributing to the disaster; and this, we agree with the District Court, the appellants have not succeeded in doing."

In the present case the District Judge apparently reached a similar conclusion. His finding on the point was, that—

"*The headway of the Plymothian was overcome, and it is possible she had attained a slight backward movement*" (p. 451).

(8.) *As to all the above matters the burden of proof is on the Victory and on the cargo. The evidence not only falls short of being clear and convincing that the Plymothian was in any fault contributing to the collision, but, as we submit, it affirmatively establishes the contrary.*

IV.

The Court of Appeals erred in overruling the finding of fact made by the District Judge on the conflicting evidence of witnesses produced before him, that the headway of the Plymothian was completely stopped at the time of collision.

Though it is not explicitly stated anywhere in Judge Simonton's opinion, that the way of Plymothian was not stopped at the time of collision, the imposition of damages upon her, necessarily implies that she contributed to the collision by some forward movement on her part. This is also to be inferred from some passages in the opinion. It is said (p. 502):

" Each doggedly kept her course, without taking any precaution whatever *until too late*, and when the pending collision became inevitable. * * * We cannot find anything in this record which shows any precaution taken by the Plymothian when she saw the Victory disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision (p. 503.) * * * The Plymothian was guilty of an "act of omission. The course of the Victory seems almost willful. The Victory was the chief cause of the disaster. If the Plymothian had taken the precautions which she should have taken, THE DISASTER *might have been prevented*" (p. 503).

In saying that the Plymothian "doggedly kept her course, without taking any precaution whatever until too late," it is assumed the Court meant until too late for her

to stop her headway before collision; for if the Court meant to say that the Plymothian, under any circumstances was bound to do more than to be completely stopped at the time of collision, more than to have become a stationary object, such as an anchored vessel, it imposed obligations on her in excess of those stated in the regulations. All that Rule 21 requires is that "every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse." It does not require the vessel to back away.

If the Plymothian had no headway over the ground at the time of collision, she was not in any fault contributing to it.

In the recent case of the *Nymphea and the May*,* BROWN, *J.*, stated the rule on this subject, in a fog case, as follows:

"In the present case, if it were clearly established that either vessel in fact came to a stop in the water before collision, she should be exonerated, and the whole blame fall upon the other."

In the *Corsica*, 9 Wall., 630, 634, the Court said:

"It is also evident that the *Corsica* was under considerable headway when the collision occurred. The force of the blow proves this. *The 'American' did not contribute to the effect of the blow, for the weight of the evidence is that she was backing away from the 'Corsica' at the time.*"

In the *Umbria*, 166 U. S., 404, 417, BROWN, *J.*, said:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her *to stop in time to avoid a collision*, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law" (see also pp. 420, 421).

---

* District Court, Southern District of New York. Opinion, dated October 6, 1897, as yet unreported.

The finding of fact made on this subject by the District Court, was explicit (p. 451):

"The two steamers thereupon, and at the same time, blew alarm whistles, and at once backed their engines at full speed, and this backing of engines continued until the collision occurred. *The headway of the Plymothian was overcome, and it is possible she attained a slight backward movement.* The headway of the Victory was not overcome, and she ran into the Plymothian's broadside, with such force as to drive fifteen inches into her side, and to render immediate beaching necessary."

The direct evidence that the Plymothian's headway was fully stopped at the collision, is that of Mardon (p. 266), Lyons (p. 211), Baird (p. 232), Wood (p. 239), Schroder (p. 203), Ham (p. 193), witnesses from the deck of the Plymothian, who were examined by deposition before the trial; of Henley (p. 362), Etheridge (p. 355), Harrison (p. 395), Goodwin (pp. 374, 375), Clark (p. 388), and Wynne (p. 405), all of whom were examined in the presence of the Court.

The evidence opposed to this was very slight, coming mostly from the Victory's officers and crew (p. 40, 41, 96, 98, 109, 110, 119, 140) examined before trial, and from the witnesses Nelson (p. 333) and Pratt (p. 307), who were examined before the Court. A conflict of evidence was thus presented upon which the credibility of the witnesses had a most important bearing. The Court may also have drawn inferences from the failure of Victory's other disinterested witnesses to speak to this point.

The rule repeatedly laid down in such cases is that the Appellate Court should not reverse a finding of fact made by the District Court upon conflicting testimony of witnesses produced before him, unless it appears to be clearly against the weight of evidence (The *Charles Hebard*, 6 U. S. App., 641; The *Warrior*, 7 U. S. App , 559; The *Royal*, 14 U. S. App., 30; *City of New York*, 14 U. S. App., 39; The *Shackamaxon*, 26 U. S. App., 694; The *Jersey City*, 1 U. S. App., 244; The *Niagara & The Express*, 1 U. S. App., 658.; The *Grafton*, 1 Blatchf., 173; The *Sampson*, 4 Blatchf., 28; The *Florida*, 4 Blatchf., 470; The *Sunswick*, 5 Blatchf., 280; The

Guimarais, Appeal, 28 Fed., 528; The *Thomas Melville*, 37 Fed., 271; The *Albany*, 48 Fed., 565; The *Alijandro*, 56 Fed., 621; The *Wilhelm*, 59 Fed., 169; The *Phoenix*, 58 Fed , 928).

These cases proceed upon the theory that the character and demeanor of a witness—amongst the most important ingredients in his evidence—cannot be sent up to the Appellate Court as a part of the record, and upon the presumption that the findings of the District Court are based upon sufficient evidence. Unless the contrary be shown, it is assumed that the District Court attached more weight to the evidence of the witnesses testifying in accordance with his finding, than to that of those who testified to the contrary. The character and demeanor of the witnesses who testified in accordance with the District Court's finding are presumed to have made the evidence preponderate to that effect.

In the present case, it cannot be said the evidence was clearly against the District Court's finding. The most that can be said is that it was made on a conflict of proof. There are peculiar reasons why the finding of the District Judge should have been adopted. The pilots of both vessels, and seventeen of the twenty-one disinterested witnesses to the collision, were examined in open Court. The long and wide experience of the District Judge, his practical acquaintance with the local waters, his presumptive knowledge of the character and credibility of the witnesses, especially fitted him to judge of and determine the weight that should be accorded to their evidence. In the absence of a clear weight of evidence against his finding, the Court of Appeals erred in holding that the Plymothian contributed to the collision by her headway at the time the vessels struck.

V.

Plymothian was not in fault on the score of lookout.

(**a**.) No fault was found against her on this ground, either in the District Court or in the Circuit Court of Appeals.

The District Judge, indeed, was of opinion that she ought to have had a lookout stationed in the bows, but held that any fault in this respect did not contribute to the collision, as her captain, pilot and third officer were all on the bridge, and, the view being clear and unobstructed, were in position to see everything perfectly, did see the Victory's changes and got their own ship fully stopped before the collision.

The master himself was engaged in keeping lookout. The only fact in connection with which the question of lookout could be important relates to the failure of those on the Plymothian to hear an earlier two-blast signal blown by the Victory. But this signal itself is involved in grave contradiction of testimony (*ante*, p. 45). If it was blown when the ship was below Craney Island Lighthouse (as testified by a number of the witnesses, notably by Captain Wynne of the tug Lumberman who was directly abreast of the Victory, and therefore best qualified to testify as to her position in the channel when she blew it), then it would be unimportant whether it was observed on the Plymothian or not. The vessels were more than a mile and an eighth apart at that time. The signal itself was not followed by any change of course on the part of the Victory, which, prior to passing Craney Island and for some time afterwards, was well on the westerly side of the channel and on the Plymothian's port bow. The Plymothian blew three single-blast signals after that, which were not dissented from by the Victory until the last one (pp. 271, 360, 361). That dissenting signal and the change of course were both observed and the proper manœuvers were taken to avoid the risk they created. If, on the other hand, it be found on the Victory's evidence that her first two-blast signal was blown when she was half way between Craney Island Light and buoy 7, the vessels would still be over a half mile apart, with room to correct the proposed erroneous course. Her evidence that she blew her second blast inside of a half minute after the first should also be considered in this connection; and, as the Plymothian heard one of these signals and immediately acted on it, at the first indication of any change of course, the failure to hear the other one, whether blown a half

minute before or after the one she did hear, ought not to be considered a fault.

(**b.**) The cargo's claim that fault in the Plymothian is to be presumed from the absence of lookout is not tenable.

The presumption of a fault only arises from the failure to obey some statutory regulation. The cases cited by the cargo's counsel go only to that length. There is, however, no statutory rule which prescribes that in all circumstances a lookout shall be placed in the bow.

(**c.**) This Court has repeatedly held that the absence of a special lookout in the bow is immaterial, unless there be proof that his absence contribued to the collision (*The Bluejacket*, 144 U. S., 371, 389, 390; *The Nacoochee*, 137 U. S., 330, 341; *The Oregon*, 158 U. S., 186, 195; JACKSON, *J.*, in *The Ontario*, 41 Fed. Rep., 793, 798).

The Plymothian maneuvered in time to be wholly stopped before the collision and therefore did not contribute to it by the want of a lookout or otherwise.

VI.

The Plymothian, if in any degree at fault for the collision, is freed from responsibility to her cargo by the express provisions of the bills of lading under which she carried it.

(**a.**) By a stipulation with exhibits annexed (pp. 483, 493), it is agreed that of the cargo of 3,682 bales of cotton shipped on the steamer at Galveston, 1,671 bales were shipped thereon under bills of lading of the Texas European Steamship Line, all of which contained, amongst other provisions, the following:

"It is mutually agreed that the vessel shall not be liable for loss or damage occasioned by collisions, stranding or other accidents of navigation, of whatsoever kind (even

when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the vessel, or by any of them, or by the ship's husband or manager). * * * *This contract shall be governed by the law of the flag of the vessel carrying the goods.* * * * In accepting this bill of lading, the shipper, owner and consignee of the goods, and the holders of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding" (p. 483).

The other 2,011 bales of cotton were shipped from interior points under bills of lading given by the inland carrier to the shipper.

Upon reaching Galveston, the cotton was delivered by the inland carrier to the Plymothian, which issued, upon receiving the said cotton on board, other bills of lading or receipts therefor to the inland carrier, all of which contained both the negligence and flag clauses in substantially the language hereinbefore set forth (p. 484).

The bills of lading given by the inland carriers contained the negligence clause as above set forth, but did not contain the flag clause (p. 484).

There were thus three different forms of bills of lading before the District Court.

It was agreed further (p. 484) that originals or copies of the three *forms* of bills of lading should be produced, and three such bills were actually produced and used (p. 484) in the Court below (pp. 488, 494).

The so-called inland bill of lading No. 48 (p. 494) issued by the Gulf, Colorado and Santa Fé Railway, provided that the goods should be carried by that railroad to the seaboard only, and that it had

"liberty to forward the goods or property to port of destination by any other steamer or Steamship Company than that named [Steamship Sandfield], and this contract is executed and accomplished, and the liability of the Gulf, Colorado and Santa Fé Railway as common carriers thereunder, terminates on the delivery of the goods or

property to the steamship or Steamship Company, or their agents at Galveston, Texas" (p. 495). And further (at p. 497), it was provided:

"The liability of the Gulf, Colorado and Santa Fé Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein."

There was a further clause stating that the goods were to be transported from the port of Galveston, Texas, to the port of Liverpool, England, by the steamship *Sandfield*, with liberty to ship by any other steamship or steamship company, subject (amongst others) to the following terms and conditions, namely:

"Negligence or default of *pilot*, master, mariners, engineers or other persons in the service of the ship, whether in navigating the ship or otherwise * * * or any other accidents of the seas, rivers and steam navigation, of whatever nature or mind soever" (p. 496), "and of collision" (p. 495) "excepted."

The bill of lading also contained the following (494):

"☞ The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or Steamship Company at time of shipment."

There was also a provision, that if the cargo had to be forwarded from the port of discharge to any other place, it should be "subject to all conditions which may be exacted by the companies or individuals who may complete the transit" (p. 497).

The effect of these provisions would seem to be that the bill of lading No. 48 of the Gulf, Colorado and Santa Fé Railway Company was a contract to carry to the seaboard merely, and to forward the goods from there upon the terms and conditions of the steamship's form of bill of lading, and that the shipper, by the terms of the contract, made the first carrier his agent, to agree upon carriage from the seaboard to the port of destination, upon the terms and conditions in the form of the steamship's bill

(*Moore* v. *Harris*, 1 App. Cas., 318; 3 Asp., 173; *Duluth & Marquette Ry.* v. *F. & M. Bk.*, 20 Wis., 122; *Hinckley* v. *N. Y. Central*, 56 N. Y., 420; *Watts* v. *Saxon*, 11 La. An., 43; *Union Ex. Co.* v. *Shoop*, 4 Norris (Pa.), 325).

In point of fact, steamship's bills of lading were issued by the master at Galveston for the cotton covered by the inland bills expressing the terms upon which he undertook to carry it from Galveston to Liverpool (p. 493), and the present representatives of the cargo brought the master's bills of lading into Court in proving their claims against the steamship in these proceedings. All the parties, therefore, apparently concede by their acts that the ship's bills of lading are those governing the rights of the parties and not the inland bills.

The form of the ship's bill covering the goods mentioned in the inland bills is contained in the record (pp. 488, 493), and provides:

"That the contract shall be governed by the law of the flag of the vessel carrying the goods" (p 492).

It also provides (at p. 493):

"The goods referred to in this bill of lading are such portion of those mentioned in the through bill of lading No. 48, contract 287, dated October 7, 1891, and shipped at Ardmore by N. P. Anderson & Company (for steamship Sandfield), as have been actually put on board the steamer; but the said goods are only carried on the terms and conditions of this present ocean bill of lading, and are to be delivered upon presentation of the said through bills of lading and this ocean bill of lading together."

(**b.**) It was further stipulated between the parties (p. 484):

"That the law of Great Britain in respect to the validity of the foregoing provisions and exceptions appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the briefs, and upon the arguments of counsel to such printed reports as proofs in this case of the law of Great Britain, in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the record."

Cases illustrative of the English law on the subject of Negligence Clauses, to which reference is made under the foregoing stipulation, are: *Chartered Bank* v. *Netherlands Steam Nav. Co.*, 10 Q. B. D., 521; 5 Asp., 65; The *Duero*, L. R., 2 Adm. and Eccl. 398; *Taubmann* vs. *Pac. Steam Nav. Co.*, 26 L. T. N. S. 704; *Steel* vs. *State Line S. S. Co.*, L. R., 3 App. Cas., 72; *Manchester S. & L. R. Co.* vs. *Brown*, L. R., 3 App. Cas., 703; *Grill* vs. *General Iron Screw Collier Co.*, L. R., 1 C. P., 600; The *Cressington* (1891, Prob. 152).

English cases as to responsibility for the neglect of a pilot, to which reference is also made, are: *Carruthers* vs. *Sydebotham*, 4 M. & S., 77; The *Maria*, 1 Wm. Robb., 95; The *Agricola*, 2 Wm. Rob., 10; The *Bilboa*, Lush., 149, 154; The *Halley*, L. R., 2 P. C., 193; The *Hector*, 8 P. D., 218, 224; *General Steam N. Co.* v. *B. & C. S. N. Co., Ltd.*, L. R., 3 Ex., 330.

Pilotage under the laws of Virginia is compulsory. (Code of *Virginia* (1887), §§ 1963, 1965, 1976).

The collision occurred in pilotage waters. "*To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course, speed*, and the time, place and manner of anchoring her" (The *Caledonia*, 157 U. S., at p. 402).

The Plymothian being a British ship, and flying the British flag, the law of England was that in contemplation of which the parties are deemed to have contracted.

(**c**.) Where it appears expressly that the parties contracted with reference to a foreign law, it is the law of this country that such foreign law *prima facie* should be applied in expounding the contract (*Wayman* v. *Southard*, 10 Wheaton, 1, 48; *Pritchard* v. *Norton*, 106 U. S., 124, 137; *Watts* v. *Camors*, 115 U. S., 353, 362; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, 447; The *Oranmore*, 24 Fed., 922, 928; *Dobell* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408).

By that law the Plymothian would not be liable either for the negligence of the pilot or for that of the officers or crew.

The Court of Appeals assigned no reasons for its refusal to apply the law the parties adopted. Its reason is assumed to have been that by our law the negligence clause would be invalid, as opposed to public policy, and that this affords a sufficient ground for refusing to administer the foreign law. If that be the ground of the Court's refusal, we submit that it was insufficient.

This case thus brings before the Court for determination a question never here decided, namely, whether the negligence clause exempting the ship from responsibility for the negligence of her compulsory pilot, or of its own officers, will be upheld as a valid contract where it expressly provides that it is to be governed by the law of the country to which the steamship and the consignee of the merchandise both belong.

In *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S., 397, the intimations of the Court were that the foreign law would be applied, if the parties evinced a clear intention in their contract to be governed by it; and there was no suggestion in the opinion that such law would not be enforced, merely because in upholding negligence clauses it differed from our own.

Mr. Justice GRAY, in delivering the opinion (p. 447), said:

"The general rule as to what law should prevail in case of a conflict of laws concerning a private contract was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by sir William Blackstone, who had been of counsel in the case) as follows:

"'The general rule established, *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had a view to a different kingdom (*Robinson* v. *Bland*, 1 W. Bl., 234, 256, 258; s. c., 2 Burr., 1077).'"

Again (at p. 461):

"Both parties, or either of them, may have supposed the stipulation to be valid; or both or either may have

known that by our law, as declared by this Court, it was void. In either aspect there is no ground for inferring that the shipper at least had any intention, *for the purpose of securing its validity, to be governed by a foreign law*, which he is not shown, and cannot be presumed, to have had any knowledge of. * * *

"Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country."

In *Pritchard* v. *Norton*, 106 U. S., 124, 136, Mr. Justice MATTHEWS (136, 137) stated the rule as follows:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Ch. J. Marshall in *Wayman* v. *Southard*, 10 *Wheat.*, 48, where he defined it as a principle of universal law: 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 *Burr.*, 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, *L. R.*, 1 *Q. B.*, 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter' (*Le Breton* v. *Miles*, 8 *Paige*, 261).

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

"So, Phillimore says (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*—as the place to the jurisdiction of which the contracting parties elected to submit themselves.'

"The same author concludes his discussion of the particular topic (4 Int. Law, Sec. DCLIV., pp. 470-471) as follows:

"'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.'"

(**d.**) The mere fact that a clause of the contract, valid by the foreign law, would be opposed to the public policy of this country, if made with reference to our law, is not generally regarded as a ground for refusing to enforce the law the parties have adopted.

A clause adopting foreign law in connection with a negligence exemption was before Judge MORRIS in the *Ornamore*, 24 Fed. Rep., 922, 928, under a contract made in Baltimore for the shipment of cattle to Liverpool.

In dealing with that clause of the contract which called for the application of English law (p. 927), he held:

"The presumption is that the parties enter into a contract with reference to the law of the place where it is made, but this presumption is easily overthrown by circumstances which show that this was not the intention of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.*, 6 Pet., 203, it is said by the Supreme Court:

"'The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed.'

"The present question is not one which affects the capacity of the parties to make the contract. It is not a case in which, according to the American law, it could be said that there is no contract at all binding on the parties. It is merely a question of the extent and nature of the obligations and conditions of a contract. The law is thus stated in *Story Confl. Laws*, 242:

"'Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, for, as we shall

presently see, in the latter case the law of the place of performance is to govern.'

"At page 280 he further said:

"'The rules already considered suppose the performance of the contract to be in the place where it is made, either expressly or by tacit implication. But where the contract is expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.'

"And the author cites as clearly expressing the rule the statement of Lord Mansfield:

"'The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.'

"In *Whart. Confl. Laws*, 472, it is stated to be a rule fairly deducible from adjudged cases that where there are no other controlling circumstances, a contract of carriage is to be interpreted by the law of the carrier's principal office. In this case, although the contract was made in the United States, it was made in the port of Baltimore by a resident of Chicago with a British corporation for carriage in a British ship to a port in Great Britain, and the express agreement of the parties, deliberately made two months before the shipment, was that any question arising against the carrier under the contract or the bill of lading should be determined by the English law.

"Under all these circumstances, it seems to me the Court should give effect to the clause of the agreement. *It leaves the intention of the parties beyond doubt of any kind, and that intention was to give the provisions of the bill of lading such efficacy as the English Courts would give to them.* As I understand the facts of the case and the rulings of the English Courts upon similar bills of lading, I think the exceptions cover the injuries sustained by this libelant, and the libel must be dismissed."

This case was affirmed on appeal by Judge BOND, whose decision has not been reported.

(**e**.) In the present case there are peculiar reasons for enforcing the English law.

In the first place, a great majority of the claimants and of the interests before the Court are British. Both vessels are British; and in the answer of the insurance companies

to the Plymothian's petition it is shown that the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the London Assurance Corporation are all British corporations, and that the copartnership of C. T. Bowring & Co. are underwriters at Lloyds, England, and hence presumably English. The claims they proved amount to about $51,000.

The only American claimants are the Atlantic Mutual Insurance Company and the Insurance Company of North America; and, although the companies themselves are domestic, it appears from the answers that the losses they paid were to British subjects. The Atlantic Mutual Insurance Company avers that it "has established a claim in the amount of £693 10 British Sterling, equivalent to $3,374.91." The Insurance Company of North America avers that it "has established a claim of the amount of £3,531 British Sterling, equivalent to $17,183.61." The combined claims of these two companies amount to about $20,500. The claims of all the other claimants are also alleged in Sterling, showing conclusively that the persons in whose right these claims are put forward were all British, and hence that all the parties and both the vessels were British.

In the second place, the collision occurring between British vessels, there would be no inherent injustice in adjudging their mutual rights and liabilities according to the law of their own country.

This Court, in *The Scotland*, 105 U. S., 24, 29, said:

"But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the Court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly."

And in *The Belgenland* (114 U. S., 355, 370), it was said:

"Another qualification is that if the maritime law, as demonstrated by both nations to which the respective ships belong, be the same in both, in respect to any matter of liability or obligation, such law, if shown to the Court, should be followed in that matter, in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge."

(f.) What is the objection to settling the questions which have now arisen, and are here in judgment, according to the law which the parties have deliberately chosen?

The point has not arisen before, as far as we can find, with reference to a pilot.

In some District Court cases it has been said that to permit carriers to exempt themselves from the results of their *servants'* negligence would be subversive of our public policy (*e. g.*, The *Iowa*, 50 Fed., 561; The *Energia*, 56 Fed., 124; The *Hugo*, 57 Fed., 403; *Lewisohn* v. *Natl. S. S. Co.*, 56 Fed., 602).

Such might indeed be the *effect*, but it is fallacious to argue that therefore such was the *design*. We have here a printed form of bill of lading. It does not refer to the *English* law *eo nomine*. If merchandise were shipped under it upon a Spanish, French or American vessel, the law of the flag would be the law to be applied. The clause embodies a principle of general application, and is not intended to prefer any particular law in general over any other law; it leaves everything to go by the laws of the ship's country. It is no ground for refusing to uphold such a provision that as applied to a particular instance it overrides our own law, unless the contract is illegal or intrinsically immoral.

Indeed, no sound reason is perceived for refusing to effectuate a preference distinctly expressed by the parties to a contract, for some other law than our own, if they think such law more equitable or just, or want it for other reasons, even though the Courts should think the

parties ought not to prefer it or want it. Especially is this so where all the parties in interest are subjects of the country whose law they adopt.

In *Van Remisdyk* v *Kane*, 1 Gallison, 371, 375, Judge Story, in dealing with a contract made in Java, stated the limitations upon the general principle as follows:

"The rule is well settled that the law of the place "where a contract is made is to govern as to the nature, "validity and construction of such contract; and that "being valid in such State, it is to be considered as "equally valid and to be enforced everywhere, *with the "exception of cases in which the contract is immoral or "unjust, or in which the enforcing it in a State will be "injurious to the rights, the interest or the convenience "of such State or its citizens.* This doctrine is explicitly "averred in *Huberus De Conflictu Legum*, 2 Tombe, lib. "1, tit. 3, and has become incorporated into the code of "national law in all civilized countries" (citing many authorities).

In his *Conflict of Laws*, Secs. 244, 245, 246, Judge Story deals with the limitations above suggested upon the general principle, and the only cases he found were: (1) contracts in fraud or evasion of the custom laws of the forum; (2) contracts for distribution of proceeds of prize, resulting from collusive capture and condemnation procured in our courts by enemies; (3) cases to recover the price of slaves sold abroad; to which a distinguished French writer, *Foelix*, 1 *Droit International Privé*, 236, adds another category, namely (4), cases of gambling contracts, and those relating to lotteries.

Plainly our policy regarding negligence clauses falls within none of these classes.

In Hon. David Dudley Field's *Outlines of an International Code*, Articles 602, 603, the rule upon this matter was proposed as follows:

"602. Subject to Articles 604 and 605, a contract made "within the jurisdiction of one nation, and agreed ex-"pressly or tacitly to be performed either wholly or "partly within the jurisdiction of another, is governed "as to its validity by the law of the place where it is

" made; and as to its interpretation, by the law actually " or presumptively intended by the parties for that pur- " pose, as provided in the next article.

" 603. The law intended by the parties to govern the " interpretations of any stipulation of their contract is " deemed to be:

" 1. The law of any nation named by them as part of " their contract; or

" 2. *If no such law is so named*, the law of the place " which such stipulation is agreed to be wholly performed; " or

" 3. If no such law or place of performance is specified, " the law of the place of the making of their contract; " but in this case a contrary intention may be shown."

Articles 604 and 605 proposed to except from the operation of these rules the cases only (1) a contract forbidden by an *express* provision of law, or (2) which is unlawful everywhere in civilized countries, or (3) is made with intent to violate an *express* provision of this Code or of the laws of any nation a party to the Code.

It was never suggested in the proceedings of the Society for the Codification of the Law of Nations that these sections proposed any innovations upon the generally received rule, or narrowed the exceptions where the rule is not followed.

FOELIX states the general rule as practised in countries following the Civil Law (1 *Droit International Privé*, p. 223) as follows:

" Le principe général en cette matiére est que les parties " contractantes ont eu l'intention de se conformer, dans " leur conventions à la loi du lieu où celles-ci ont été " consenties et sont devenues parfaites, et par suit de les " soumettre à cette loi; en d' autres termes, que la valeur " intrinsèque, la substance, le lien, *vinculum juris*, des " conventions depend de la loi du lieu où elles ont recru " leur perfection; l'acte valable où nul d'aprè cette loi " le sera également partout " * * *

" Lorsque les contractants *n' ont pas, expressément* " *adopté* la loi de lie où le contrat a été passé alors com- " mence les presomptions " (p. 225).

" Lorsque le divers contractants n'ont pas la même pat- " rie le même domicile, on ne saurait donner la préférence " aux lois de la patrie où du domicile de l'un d'eux ni juger " sur l'intention que l'un d'eux pretendrait avoir eue de

" se rapporter aux lois et usages de sa patrie; car il est " de l'essence de toute convention qu'il y ait consentement " commun des parties sur tout ce que compose le contrat. " Dès lors on a dû admettre que leur volonté s'en rap- " portée à une loi commune et par un accord à peu près " unanime, les auteurs et les tribunaux ont admis en " principe qu'il faut s'arrêter à la loi du lieu où le contrat " a été passé " (p. 228).

To this effect *Story, Conflict of Laws*, Sections 239, 240, 241, 242.

FOELIX states the exception thus: " Lorsque le contrat est contraire aux bonnes moeurs ou aux institutions ou prohibitions existant dans le pays où il doit recevoir son exécution ou lorsqu, il porte prejudice soit aux intérêts d'une nation, soit aux droits acquis par les citoyens de cette nation " (p. 235).

It is noteworthy that he does not include public policy within the exception.

(**g**.) A State Court, called upon to administer the law of another State or of a foreign State or of a foreign country, could refuse to do so, upon the grounds which would justify this Court in a similar refusal, yet in practice they do not regard the public policy of their own State as a sufficient ground for applying their own law, instead of the foreign law, where the latter would otherwise be applicable (*Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553; *Forepaugh* v. *D. L. & W. Ry.*, 128 Penn. State, 217, and cases there cited; *Brown* v. *Browning*, 15 R. I., 422; *Gross* v. *Jordan*, 83 Maine, 380; *Dugan* v. *Lewis*, 79, Texas, 246).

(**h**.) The contract here in question is not opposed to any public policy prevailing at the present time. The third section of the act of Congress entitled " An Act relating to Navigation, Bills of Lading," &c., approved February 13, 1893, provides:

" That if the owner of any vessel transporting mer- " chandise or property to or from any port in the United

" States of America, shall exercise due negligence to make " the vessel in all respects seaworthy and properly manned, " equipped and supplied, *neither the vessel or owner, or* " *owners*, agents or charterers, *shall become or be held re-* " *sponsible for damage or loss resulting from faults or* " *errors of navigation or in the management of said ves-* " *sel.*"

If that statute were the law for the present case, and the Court should reach the conclusion that the loss arose from negligence in navigation, then so far from an exemption against such damage being contrary to our public policy, the specific loss would fall within an exemption provided by national legislation (the *Silvia*, 64 Fed., 607; the *Elona*, 64 Fed., 880). In the *Silvia*, on appeal to the Circuit Court of Appeals (68 Fed., 230), WALLACE, *Circuit Judge*, in affirming the decree below, said:

" Read as a whole, the purpose of the act manifestly is, " on the one hand, in the interests of the public to prevent " carriers from evading responsibility to exercise due dili- " gence in providing sea for vessels, and in the handling " and care of the cargo; and on the other hand, whenever " they have exercised due diligence in these respects, to " absolve them from liability for loss arising during the " transit, from the perils of the sea and from faults or " errors in the navigation or management of vessels."

It is noticeable that none of the cases under the law as it stood before the Act of 1893, dealt with an exception from liability for faults or errors in navigation by a *pilot* The language of the statute is most apt to include such negligence and to relieve the shipowner from it. While that act has no direct bearing on the present controversy, it may be looked at as a legislative view of public policy, and as showing the futility and substantial injustice of adding to the few exceptions to the great rule that the chosen law of the contract should be applied, a principle of such slight consequence that it is subject to be changed by legislative enactment from time to time, even between the occurrence of accidents and the trial of cases growing out of them, in the ultimate Court of Appeal.

VII.

If any fault be found on the part of Plymothian, not covered by the bills of lading, it was slight as compared with the faults of the Victory, and the Court should therefore apportion the damages in accordance with the degree of the faults.

1. *The form of the decree entered by the Circuit Court of Appeals was erroneous, whatever rule of division may be adopted.*

On the finding that the Victory was in fault, and that both Plymothian and the cargo had suffered damages by it, and both had duly proved their claims, it became the duty of the Court, under Rule 55, to order the amount of the Victory's bond and interest to be paid into Court, and to decree that—

"The moneys be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims duly proved and confirmed as aforesaid."

As the liens for the cargo damage and Plymothian's damage, or a balance thereof, were of equal rank (*Norwich* v. *Wright*, 13 Wal., 104, 122), the decree should have been in accordance with the rule.

If the Court found both to blame, but in unequal degrees, the degrees should have been stated—as, for example, four-fifths and one-fifth; and Plymothian should have had a decree against the Victory's bond for her recovery on this basis *pro rata* with the cargo, with a proviso that she make up the cargo's deficiency, if any, not exceeding her limitation value.

2. *The Court may divide the damages in any proportion it thinks proper.*

(**a**.) The usual rule heretofore followed in this Court has undoubtedly been to divide ship damage equally between

two offending vessels (The *Max Morris*, 137 U. S., 1, 9). But the question whether the Court was bound so to divide them does not appear to have been specifically passed upon. Even in the countries where the rule is to apportion them in accordance with the degrees of fault, it seems that they are more frequently halved than divided in other proportions; and it may be that no such disparity in the faults has existed in the cases previously decided as to call for an express decision on the point.

It is noticed, however, that in Mr. Justice WOODBURY's opinion in *Waring* v. *Clark*, 5 Howard, 441, 503, he says:

"If both vessels were in fault the damage is to be divided *either* equally between them (3 Hagg Ad., 328, note; 4 A. & E., 431; 9 C. & P., 613; Reeves *v.* The *Constitution*, Gilpin, 579), or *they are to be apportioned in some other more appropriate ratio, looking critically to all the facts* (Woodrop Sims, 2 Dodd., 85; 3 Scott N. R., 336; 3 M. & G., 59; Curtis' Admiralty, 145, note)."

And in the case of the *Max Morris*, 137 U. S., 1, 15, Mr. Justice BLATCHFORD, in delivering the opinion, said:

"Whether in a case like this" [both to blame] "the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

(**b**.) It is noteworthy also that under the operation of the Limited Liability Acts one vessel has frequently been adjudged to bear a greater amount of damages than the other, where both are to blame, a case that frequently arises where the interests of a third vessel or its cargo are involved.

The North Star, 106 U. S., 17.
The Alabama and The Gamecock, 92 U. S., 695.
The Hartford and *The Unit*, 97 U. S., 323.
The Sterling and *The Equator*, 106 U. S., 647.
The *Washington* and The *Gregory*, 9 Wal., 513, 516.

In the *Mary Ida*, 20 Fed., 741, 747, BRUCE, *J.*, divided the damages in the proportion of three-fourths and one-fourth, on a finding of desparity in faults.

(**c**.) In personal injury cases, of which *The Explorer*, 20 Fed. Rep., 135; *The Wanderer*, 20 Fed. Rep., 140, and the Max Morris, *supra*, 24 Fed. Rep., 860; 137 U. S., 1, are examples, no effort has been made to determine the exact damages, and then, on a finding of mutual fault, to award the libelant an exact half. Indeed, the damages appear to be worked out rather on the theory of awarding to the libelant a sum which, under all the circumstances, taking account of the gravity of his fault as compared with that of the vessel, seems fair.

As stated in *The Max Morris*, 24 Fed. Rep., at page 864, the rule is "to give or withhold damages according to principles of justice and equity, considering all the circumstances of the case, not as full compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury;" to hold vessels liable to pay "*some part* of the actual pecuniary loss where their fault is clear, provided that the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable."

The conclusion of BROWN, *J.*, page 64, was stated by him as follows:

"This is a case sufficiently strong, as it seems to me, to require the claimants to bear some part of the damage that their concurrent negligence occasioned. Following the precedent of *The Explorer*, *supra*, I shall charge to the libelant's own fault all his pain and suffering and all mere consequential damages, and charge the vessel with his wages at the rate of two dollars per day for seventy-five working days, making $150, for which sum a decree may be entered, with costs."

This language was in substance re-stated and adopted in the decision of this Court (137 U. S., at p. 14).

The question whether the damages should be divided equally or unequally is open under the prayer for general relief (The *Gazelle*, 128 U. S., 474).

(**d**.) The history of the rule by which damages were divided is involved in some obscurity. (*Marsden, Collisions*, 3d ed., p. 145) It seems at first to have been applied in cases of inscrutable fault; and was not applied in any court in England in a case of mutual fault until the case of *The Petersfield* and *Judith Randolph*, decided by Sir James Marriott, Judge of the Admiralty Court, May 20, 1789 (Marsden, p. 151). The rule for such cases was not announced in the House of Lords until 1854 in the case of *Hay v Le Neve*, 2 Shaw's Scotch Appeal Cases, 395. In that case the judgment below had apportioned the damages two-thirds upon one vessel and one-third upon the other, but in the House of Lords it was held they should be divided half and half.

Starting from the same beginnings (Judgments of Oleron, 2 Black Book of Admiralty, 379; the Rolle of Olayron, do, 449; the Judgments of the Sea, 3 do, 21; the Gotland Sea Laws, 4 do, 87; and the Laws of Wisbuy, 4 do, 283), totally different rules have been worked out in the practices prevailing on the continent of Europe. Three different rules are there followed, where both vessels are found in fault:

(**1**.) To leave the loss where it falls. This is the rule in Holland, Italy, Spain and those of the South American States which have derived their law from Spain. It was also formerly the rule in Germany, but the proportional rule has been adopted in the new German civil code. (13 L. Q. R., 34).

(**2**.) To divide the loss proportionately to the value of the vessels in collision. This is a kind of general average principle obtaining in Turkey and Egypt.

(**3**.) To divide the loss proportionately to the faults of the two vessels. This is the rule of France, Belgium, Germany, Norway, Sweden, Denmark, Portugal, Greece and Roumania.

"*Both to Blame*," by Dr. Raikes (London). (In appendix to this brief).

"*Collisions at Sea in Relation to International*

Maritime Law," by Louis Franck (Antwerp), 12 Law Quarterly Review, 260.

"*Collisions at Sea where Both Ships are in Fault*," by Leslie F. Scott (Liverpool), 13 Law Quarterly Review, 17.

These three papers deal fully with the whole subject, and will be found of great interest.

(**e**) As an abstract principle, the rule apportioning damages proportionately to the blame would appear to be the most just and equitable that could be adopted. The reasons which have led the English courts and this Court to depart from the common-law rule in cases of contributory negligence logically lead to the adoption of the proportionate rule. As M. Franck very well says (12 L. Q. R., 262):

"If a pair of scales is the emblem of maritime justice in England, they are strange scales, in which the slightest neglect—*minima culpa*—weighs as many pounds sterling as the grossest misconduct. The English rule is then unjust. But it is also illogical. It is intelligible that the law should take away all right of recovery when there is common fault; but it is impossible to understand why a law which recognizes the principle of dividing the liability should decide that in every case the division should be by halves. That is purely arbitrary. Either the principle of division is just, and then it should be complete—that is, proportional—or it is unjust, and there should be no division—by halves any more than by quarters. But not only is the rule unfair and illogical, it is also born of an historical mistake. The practice had its origin in a mediæval rule which applied to cases of inscrutable negligence, and not at all to cases where the faults are ascertainable."

(**f**) What are the objections to be urged against the adoption of the proportionate rule in this Court?

(**1**.) The difficulty of making quantitative distinctions in the degrees of blame.

At the first blush, the task of apportioning the blame between two or a larger number of vessels may appear to be a matter of difficulty. How is a judge to tell, it may

be urged, whether the fault of one is twice, or thrice, or five times as great as that of another, or of several others? The answer is that in the practical operation of the proportionate rule the damages are divided in equal parts unless the fault of the different vessels is clearly disproportionate. The fact that the fault frequently is disproportionate is within the experience of all persons concerned with such matters.

It is pointed out in the papers above referred to that where the damages are not halved the proportions are generally thirds, fourths or fifths; and that the quantitative distinctions are worked out on common sense principles, and not by algebra. Thus, in cases of crossing ships, where a vessel bound to hold on gives way a little too soon, the damages would be apportioned four-fifths against the chief wrongdoer and one-fifth against the one that displayed weak nerve. So also in cases of steam vessel meeting sail vessel, where the sail vessel, being close pressed, changes her course, and thus contributes to a collision which could have been narrowly avoided had she held on. So also where the fault of one has imposed upon another the duty to stop and reverse, and that duty is delayed too long (12 L. Q. R., 265, 269).

(2.) The risk of appeals.

It may be thought that the vesting of so much discretion in courts of first instance would lead to frequent appeals in the hope of obtaining the exercise of a different discretion on the part of appellate courts as to the differing degrees of fault.

It is pointed out by Mr. Scott (p. 29) that: "Under the present rule of dividing the loss the Court is concerned solely with ascertaining the *quality* of the conduct of each ship—that is, whether two ships are respectively to blame, and is not concerned with the *quantity* of the blame—that is, to inquire how much each ship is to blame, or whether one ship is more to blame than the other. * * * But once admit the proportional rule and the question before the Court must be regarded in an additional light. When the Court has decided upon the evidence that each ship has broken one or more regulations, and is, therefore, to blame, it will

proceed to weigh quantitatively the facts so found, and to say whether one ship is more to blame than the other, and, if so, how much more. The Court, in thus weighing the various breaches of regulations, or other acts of negligence, already proved to its satisfaction, performs an operation which our rule of dividing the loss never requires; and it is in this particular that appeals under the proportional rule will differ from appeals under the present rule. Now, this process, which will distinguish the decision of a case under the proportional rule, is in its nature an estimate made by the Court, in the use of its discretion, of a question of fact, and is analogous to the quantitative estimate of the services of salvors—also a question of fact—which, when the quality of the services has been determined and the right to salvage remuneration, established, the Court proceeds to make in every salvage case; and as appeals from this quantitative estimate, made in the discretion of the Court, of the value of the salvage services are discouraged by the Court of Appeal, so, it is submitted, will appeals be discouraged from the quantitative estimate of the blame, which takes the form of an apportionment under the proportional rule."

M. Franck (p. 270) gives his own testimony, and (pp. 274, 278) the testimony of distinguished French advocates, that the proportional division of damages does not give rise to more appeals than would be expected where the damages are divided equally. It is also intimated that the appeals are not generally against the proportion of the division, but are on the question of liability of one or the other of the vessels for any share of the loss.

(**g**.) The difficulties of dealing with claims of cargo, where two ships are to blame, are no greater than under the rule now obtaining in this Court.

In France, Belgium, Germany, Greece, Italy, Spain, the cargo is entitled to recover its whole damages from either ship, leaving them to settle their differences *inter se* on the principle of apportionment of blame decreed by

the Court (Raikes, pp. 7, 11). But the liability of each is limited to the value of ship and freight. The form of the decree in such cases, where both vessels are before the Court, is, unfortunately, not dealt with in either of the articles above referred to. It is pointed out, however, that in Belgium (Raikes, p. 7), France (do., p. 9), Germany (do., p. 9), Greece (do., p. 10), Holland (do., p. 10), and Italy (do., p. 11), provisions in bills of lading exempting the shipowner from damages arising from the negligence of his servants are valid, and that where such clauses are before the Court, the liability of the carrying vessel is cut off.

(**h.**) The fairness and justness of the proportionate rule is found not only in the sanction given to it by the courts in principal maritime countries of Europe, but also in the commercial congresses and meetings of different societies organized to reform and harmonize maritime laws in different countries. It is not to be doubted that the trend of modern opinion is clearly in favor of this rule, not only on the continent, but in England (12 L. Q. R., 271).

If in the present case, notwithstanding the arguments addressed to the Court in her behalf, both upon the merits and upon the effect of the exemptions contained in the bills of lading, the *Plymothian* be found in any fault, it must be a slight one, "an act of omission," as the Court of Appeals said, and one which should not result in the imposition of half damages. On the findings of the Court of Appeals, not more than a fifth of the damages, if that much, should have been imposed upon her as between the vessels; as to her four-fifths she should have recovered against the *Victory's* bond *pro rata* with the cargo, submitting to a judgment for deficiency not in excess of her stipulated value. No part of her *pro rata* recovery against the *Victory's* bond should be awarded to the cargo in any event. The amount of such recovery stands in the same category with insurance moneys, which, it has been decided in this court, the shipowner may retain (*City of Norwich*, 118 U. S., 468; Butler *v.* Boston SS. Co., 130 U. S., 527, 558).

Last Point.

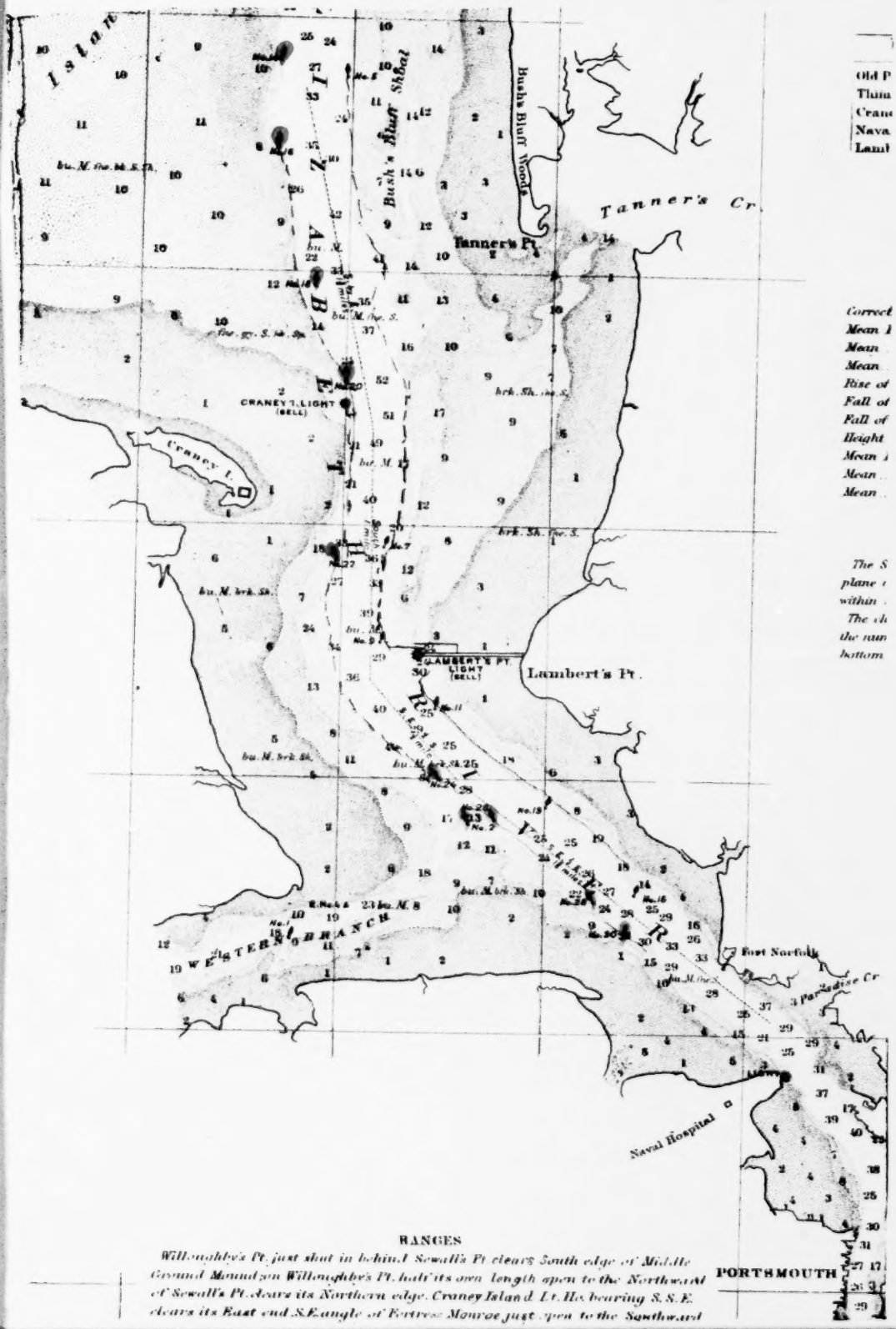
The decree of the Court of Appeals should be reversed, and the Plymothian absolved from all liability either to the Victory or to the underwriters on cargo; but if such a decree be not entered, then only the smallest amount of damages consistent with the equities of the case should be adjudged against her.

NEW YORK, October 25, 1897.

Respectfully submitted,

WHITEHURST & HUGHES,
CONVERS & KIRLIN,
Proctors for Plymothian.

J. PARKER KIRLIN,
Of Counsel.



RANGES

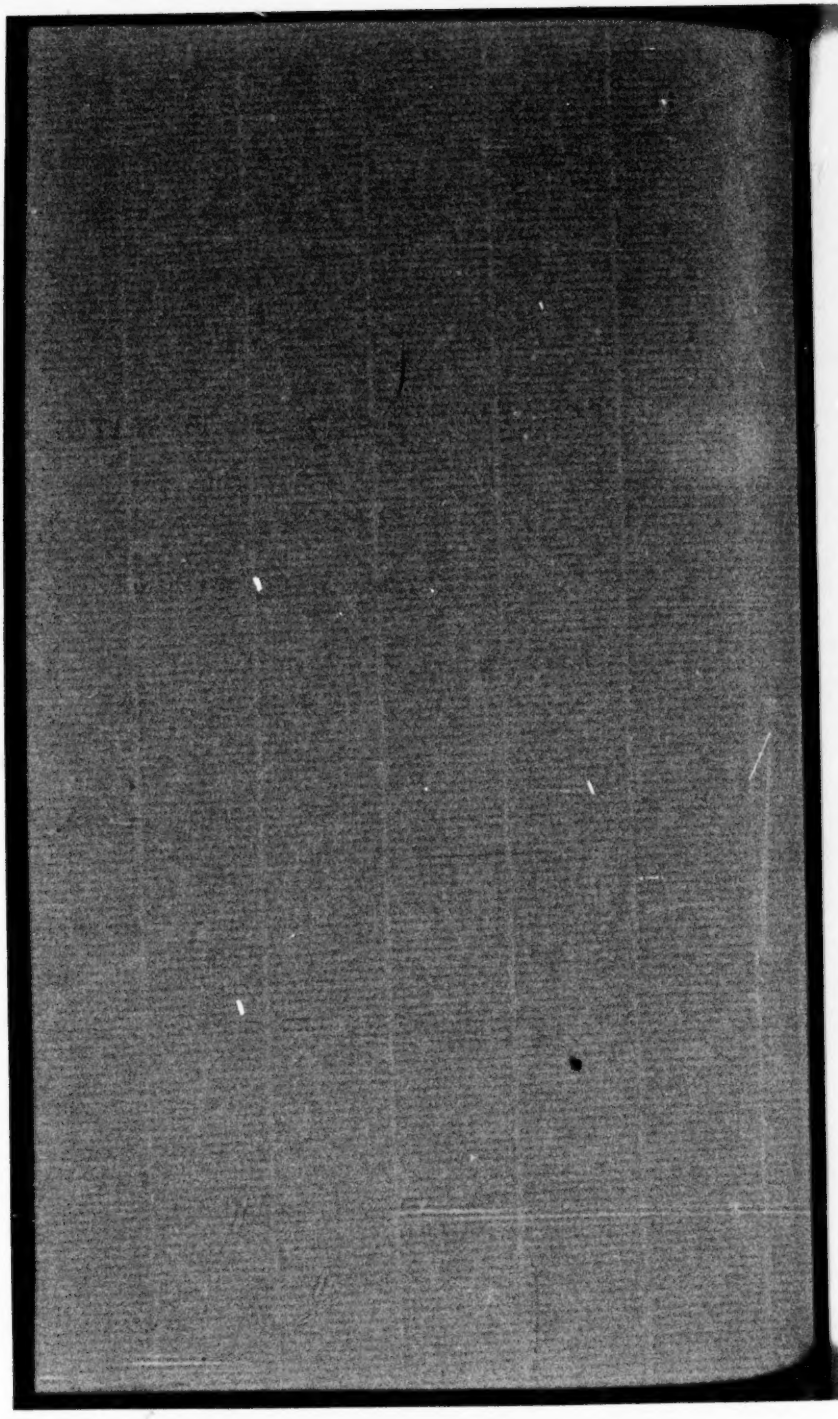
Willoughby's Pt. just shut in behind Sewall's Pt clears South edge of Middle Ground Mound on Willoughby's Pt. half its own length open to the Northward of Sewall's Pt. clears its Northern edge. Craney Island Lt. Hs bearing S.S.E. clears its East end S.E. angle of Fortress Monroe just open to the Southward

APPENDIX TO MR. KIRKLAND'S BRIEF

I. The Original Appointment of Captain De Hart's Company to "Duty as Rangers"

II. Letter on the Case of Capt. Richardson and the Honors in Regular Corps of Army

III. Diagram based on Portion's Exhibit X



"BOTH TO BLAME."

A PAPER

ON THE CONFLICT OF LAW WHERE TWO VESSELS ARE HELD JOINTLY IN FAULT FOR A COLLISION. READ BEFORE THE CONFERENCE OF THE ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS,

AT BRUSSELS ON THE 3rd OCTOBER, 1895.

BY

F. W. RAIKES, Q.C., LL.D.

PRINTED AND PUBLISHED BY
PEWTRESS & Co., 28, LITTLE QUEEN STREET, LONDON, W.C.

"BOTH TO BLAME."

"MISERA EST SERVITUS UBI JUS EST VAGUM AUT INCERTUM."

SOME fifteen years ago I adopted this legal maxim as the motto for a thesis read for my Doctor's degree before the University of Cambridge. That thesis had for its subject the general state of the Law in regard to collisions at sea, but great as are the differences in that Law, in no branch of it are they greater than in that where "both vessels—using the instrument for the person—are to blame."

Cases of differences in the Law of different States in matters connected with their own affairs on shore are of comparatively small importance; it would doubtless be convenient if a knowledge of the Law of one State of necessity, from uniformity of Law, carried with it a knowledge of the Law of all States, but yet anyone disobeying the Law of the State knows, or is supposed to know, the Law by which he will be judged. Not so at sea. Vessels under, it may be, the same flag or under different flags, come into collision, and being damaged, seek ports of refuge. In those ports they may, and very probably will, find a Law in force, both as to the liability for the collision and the amount of such liability, different from that of their own flags, and very possibly if the two vessels reach different ports, say, on the two sides of the North Sea or Channel, each will find itself amenable to a different Law.

Considering the enormous value of the shipping of the world on the one hand, and the endless international complications likely to arise in consequence of such divergences, it would appear that here at all events there is reason for international agreement. Other important questions of Maritime Law which have from time to time engaged the attention of this Association, such as Bills of Lading, and General Average, are after all matters of contract as to which the contracting-parties may, without injustice at all events, be left to make their bargains. In the case of collisions on the neutral territory of the sea there is no such possibility, and

it is surely time that as an uniform practice as to the Rule of the Road has been agreed to by all civilized States, it should be followed by an uniform liability for infractions of that Rule.

It is not my purpose to attempt to say what that uniform Law should be. I do not propose to advocate the *judicium rusticorum*, as with singular infelicity of expression for a Maritime matter the Law as to incidence of damages where both ships are to blame, administered in my own country and generally in the United States, is called, nor to denounce that of the damage, be it great or small, resting where it falls, as in Germany or Holland, nor to express any undue admiration for the logical accuracy of apportioning the liability to the fault, as practised in France, and first enacted as substantive Law in the admirable revised code of the State in which we are guests, nor to do more than draw attention to the peculiar provision of the Turkish and Egyptian Codes, which treats the matter as a species of General Average, and makes the joint damage a *pro ratâ* charge on the value of both ships.

I think in reading a paper before persons of many nations interested in the administration of Law and Justice, it is better to confine oneself to pointing out the anomalies existing, and leave it to the consensus of enlightened jurists and statesmen to decide which of the conflicting systems, or what combination of them, is most in accord with the principles of natural justice, most easily administered, and most likely to be loyally accepted by the Maritime States.

Within the limits of a paper it is not possible to deal with all *minutiæ* of a subject of this magnitude. I propose only to point out what, so far as I have been able to ascertain, is the Law and practice of different States where both ships are to blame :—

(1.) As regards damages sustained by the ships themselves.

(2.) As regards damages sustained by cargo on board the ships.

(3.) As regards claims by relatives for loss of life, or by passengers and crews for personal injuries.

(4.) What, if any, limit there is of liability.

(I.) As already observed we find three leading systems of assessing the damages :—

(*a*.) That of throwing upon the Court which tries the case the onus of apportioning the blame between the two vessels and dividing the gross damage in the like

proportion. This principle is followed in *Belgium*, under Art. 229 of the Code of 1880, and was the practice prior to the enactment of the Code (the *Damia* and the *Alster*, decided in 1880, before the Code came into operation). In *France*, the Code contains no express provision, and apparently even since the Code of Commerce came into operation the practice was that each should bear its own loss, so, at least, it is stated by Pardessus (Cours de Dr. Com., Tarlier, Vol. I., Pt. iv., Tit. II., Sec. iv.), but of late the practice has been to apportion the damage according to the amount of blame, and this practice was expressly approved by the Cour de Cassation, at Paris, in 1881, in the case of the *Rance* and the *Despatch*. M. Autran (*L'Abordage Maritime*, p. 120) states this to be in accordance with the general principles of French Law where two parties are jointly in fault.

The Commercial Code of *Greece* being practically identical with that of France and French authorities as to its interpretation being accepted in that country, it may safely be presumed that the same results would follow, but I have not come across any case of both to blame decided by the Areopagus.

Portugal has by her new Code, 1890, Art. 666, adopted the same principle. Under the former Code in case of both to blame, the damage rested where it fell; in other words, each ship paid her own damages.

The *Scandinavian States* (*Norway*, *Sweden*, and *Denmark*), by their new Codes, identical in this respect, leave the apportionment of damages (Art. 220) in the discretion of the Court, which, on principles of natural justice, would appear to be a direction to decide in accordance with the principle above stated where the Court can apportion the blame.

The *Roumanian* flag has recently been seen in or near these waters, and, therefore, a word should be given to her Law. It is verbally identical with that of France, and, therefore, so far as the Code is concerned leaves the matter at large. The practice would probably also be that of France.

(*b.*) The next division, in cases of "both to blame," decides that in such cases the damage should rest where it falls, or, in other words, that neither party should recover

from the other any portion of the damage occasioned by an accident for which both were in some degree responsible.

This principle was in force in Great Britain until 1875, in those cases where the action was instituted in the ordinary Civil Tribunals, administering the Common Law as distinguished from Courts of Admiralty administering what was considered to be the Maritime Law. This strange anomaly, that a different result as to damages should arise from the same facts according to the Court in which the action was brought, was put an end to in that year by the Judicature Act, which effected many most important changes in the administration of the Law; and now, in no collision case between two ships where both are to blame, does the rule apply. In those of the United States of North America, however, which have taken their Law from Great Britain as their Mother Country, the anomaly still exists in theory; but from the larger jurisdiction, always accorded to Courts of Admiralty by the Constitution, the difficulty has seldom any practical effect. Germany (Art. 787), Holland (Art. 535) and Italy (Art. 662) adopt the principle, the Law of Italy having been altered under the new Code in this respect. In Russia, the Code makes special provision as to the incidence of damage in numerous special cases, as of ships fouling one another when at anchor, &c., but it appears that in the ordinary case of a collision at sea it also adopts the principle, and so under its new Code does Spain (Art. 827), the earlier Code having made no special provision on the subject. The Argentine Confederation (Art. 1,263), Uruguay (Art. 1,434), Chili (1,130), Venezuela (634), take the same view. Mexico and Peru follow the Spanish law in force prior to the new Code, which contained no special provision for "both to blame," but it appears that following the former practice in Spain, unless one ship could be shown to be wholly in fault, the matter was treated as a pure accident, and as in that case each would bear his own loss, these States also would arrive at the same result though by a different route. In the Austrian ports on the Adriatic, so far as I have been able to ascertain, some years ago the rules of the Italian

Code of Commerce, then in force, were followed by the Courts in Maritime matters, as regulating the general practice of seamen and shipowners in those waters. I am not aware whether the new Code, which, as already pointed out, has altered the Law of "both to blame" in Italy is now followed, or whether the former practice is still adhered to, if it is, the case will follow (I. (*a*.)).*

(*c*.) The remaining division in which, where both are to blame, the gross damage is equally divided between the two ships, is now, so far as I have been able to ascertain, practised only by Great Britain and her Admiralty Courts in her Colonies, and by the Admiralty Courts in the United States, but probably from the very large shipping interests of these two States more actual cases of collision, where both ships are to blame, are decided under this rule than under either of the others mentioned, possibly more than under both put together.

(*d*.) There is a fourth method enacted by the Codes of Turkey and Egypt and administered in the latter State by the International and Native Tribunals, by which the whole damage is massed together and divided, as a sort of General Average, between the respective values of the two ships (Art. 249 Turkey, Art. 242 Egypt). In Turkey, however, where there are Consular Tribunals each administers the Law of its own State.

It is worthy of remark that in the last 15 years of the Maritime States of Europe alone, Belgium, Italy, Portugal, Spain, Denmark, Sweden and Norway, have all legislated on the subject, and of these States Italy and Portugal have altogether changed their previous Law, though in opposite directions, Italy having gone from class (*a*) to (*b*), Portugal from (*b*) to (*a*).

(II.) Passing now to the case of cargo :

The matter becomes even more complicated and confusing, as we have to consider the rights of the cargo upon each ship to compensation from either or both of the vessels, and it may be that the cargo can recover (α) nothing from either; (β) all its damages from the carrying ship; (γ) all its damages from the other ship; (δ) half its damages

* At the sitting of the Conference I was informed by a member that now the German Code is followed in this matter by Austria-Hungary.

from the other ship with or without a claim for the residue against the carrying ship; (ε) the whole, jointly and severally, against both ships.

The matter is still further complicated from the right against the other ship being in tort or *ex delicto* or *quasi delicto*, and against the carrying ship in contract or *ex contractu*, in which latter case, whilst most States now recognise the right of the shipowner to contract himself out of his liability in this respect, some hold such contracts to be against public policy and therefore void.

In this complication it will perhaps be best to treat the Law of each State in alphabetical order instead of attempting to classify them. I regret, however, that this method compels me to commence with a confession of ignorance, as I do not know, doubtless some of those here present can inform us, what is the Law of Austria-Hungary* on the point, and to go on in extreme trepidation that I may make some presumptuous error in stating here what I understand the Law of Belgium to be.

As I understand it, here in Belgium, innocent owners of cargo which is damaged in a collision for which both ships are to blame, can recover the whole of their damage from either ship separately or from both jointly, leaving the ships to settle their differences, *inter se*, on the principle of apportionment of blame decreed by the Court (I. (*a.*) *ante*) (*The Valdemar* and *The Adriana*, C. of A., Brussels, 13.2.89, 5 R.I.D.M. 97), but as an exception in the Bill of Lading of liability for the negligence of the shipowners' servants is valid (*Cork S.S. Co.* v. *Gossen & Cie.*, C.C., 1 R.I.D.M. 390; *Bartlett* v. *Michaelsens*, C.A., Brussels, 2 R.I.D.M. 582), the remedy against the carrying ship may be lost by the terms of the contract, and the cargo-owner may in practice be left to a claim for the whole against the other ship.†

In *France*, M. Autran (*L'Abordage Maritime*, pp. 120, 121), states the Law to be to the same effect as in Belgium, and since the publication of his book, two important decisions of the

* See foot-note on preceding page.

† Belgian advocates present at the Conference agreed that it had not been judicially decided whether a ship which had paid the whole claim could recover a proportion of it against the carrying ship, *non obstante* the Bill of Lading, but seemed to entertain the opinion that it could not. A very recent decision of the Tribunal of Commerce at Antwerp has held that where there is an exception from liability in Bills of Lading, expenses incurred by a ship in a port of refuge after a collision for which both ships are to blame are treated as general average between ship and cargo (11 R.I.D.M. 123).

Court of Cassation in Paris have endorsed his view (*The Durley* and *The Sirius*, C.C., Chambre Civil, 1.7.92, 8 R.I.D.M. 6; *The Charles Quint* and *The Ville de Brest*, C.C., Ch., Civ., 11.7.92, 8 R.I.D.M. 258). It may also be considered now as settled Law in France that a shipowner may exempt himself from liability for the negligence of his captain and crew, though until quite recently this was in great doubt, the Court at Bordeaux especially having for a long time held, notwithstanding strong indications of opinion, if not actual decisions of the Cour de Cassation, that such an exception was contrary to public policy and void.

In *Germany*, the cargo has a right to be paid the whole of its damage by either ship (*Hamburg Com.*, VI., 2,787, 1 R.I.D.M. 191), but here also the owner of the carrying ship may exempt himself from liability for the acts of his servants. There is this peculiarity in the Law, however, that, in collisions at sea, it is immaterial whether a ship is demised; that is to say, let on the terms that the crew are the servants of the hirer or not. The action for collision is against the owners of the ship, and not against the charterers whose servants occasioned the damage (*Co. Hamb., Sud Amer.* v. *Taylor Cameron, Trib. Sup. Hans.*, 14 J.D.I.P. 632, 16 J.D.I.P. 859).

In *Great Britain*, the cargo, so far as its rights against the other or colliding ship are concerned, is so far identified with the ship which is carrying it, that where both vessels are to blame for the collision, it can only recover half its damages against the other vessel for the tort (*The Milan*, Lush, 358). As regards its rights against the carrying ship, it can recover the whole on the contract (*The Bushire*, 5 Asp.), or if it has already recovered half from the other vessel, then, the residue of its claim. The owners of the carrying ship may, however, contract themselves out of all liability for the negligence of their servants on board that ship, in which case the cargo can only recover half its damage from the colliding ship, and this principle holds good even in the case where both ships belonged to the same owners who had protected themselves as far as they could against liability for the acts of their servants (*Chartered Merc. B. of India, &c.* v. *Netherlands St. Nav. Co.*, 10 Q.B.D. 521). Damages paid to cargo cannot be brought into account in settlement between the two ships, except so far as they may affect the total damage payable under the Limitation of Liability Laws, the effect of which will be noted hereafter.

In *Greece* the Law is the same as in France, and, indeed, it was decided by the Areopagus that clauses in a Bill of Lading, exempting the owners from liability for the acts of the servants, were valid prior to this matter being decided in the same sense in France (3 R.I.D.M. 491).

In *Holland*, I believe, the cargo is considered to be so identified with the ship, that in case of both to blame it falls under the same rule (I. (*b.*)) and has to bear its own loss. It is true the cargo-owner has a claim against the captain, who again has a claim over against the actual wrong-doer, probably the officer of the watch, but from the somewhat limited resources of captain and officers this remedy is likely to be not well worth prosecuting. It may also be noted that the Dutch Code makes a very special and peculiar provision for the case of doubt, that is, if the Court cannot decide which ship or whether both ships are to blame. In this case the total damage to both ships and both cargoes is added together and paid by the aggregate value of both ships and both cargoes, in the same way as General Average is on one ship and one cargo (Art. 538). Hence it may well happen that in a collision for which both ships are really to blame, but in which, from the evidence being equally balanced or other causes, the Court, though certain there is blame somewhere, fails to arrive at a conclusion which incriminates either or both, a valuable cargo, the owner of which certainly was innocent of any art or part in the collision, and whose cargo has not been seriously or at all damaged, may have to pay large sums for the repairs of both ships and compensation to the owner of the other cargo. Also, where a ship at anchor is run down by one under way, even by pure accident, half of the damage done to the ship and cargo at anchor is paid by the ship and cargo under way, being apportioned between these values as General Average (Art. 540).

By recent decisions of the Court of Appeal both owner and captain can further avail themselves of exemption in Bills of Lading for negligence of the crew (15 J.D.I.P. 560, 7 R.I.D.M. 460).

The national policy of our neighbours has always been to foster the shipowning interest, though one may express some surprise that if I have stated the Law correctly, merchants should ship and underwriters insure cargo in Dutch vessels. Probably the answer will be that the Dutch are such good and careful seamen that they do not come into collision, and so the difficulty does not arise.

In *Italy*, in case of both ships being to blame, each of them is liable for the whole damage done to the cargo of either (Art. 662), and exemption of liability for negligence of servants is valid (*C. C. Florence*, 15 J.D.I.P. 554, Trib. Civ. Genoa, 8 R.I.D.M. 418), but not of their barratry (9 R.I.D.M. 82); practically this is the same as in Belgium, France, and Germany.

In *Portugal* the new Code has made a great difference; formerly the letter of the Law was identical with that of Holland, already referred to; now the principle of apportioning the blame between the ships (I. (*a*).) extends also to the liability of the ships and the cargoes, the total damage to both ships and both cargoes is massed together, and the payment apportioned between the two ships in proportion to their respective blameworthiness (Art. 666), whilst in a case of doubt so far from the cargo getting nothing and having very probably to pay heavily, the cargo can recover from either ship. I have not been able to find any decision as to the right of a shipowner contracting himself out of liability, but Art. 708 of the Civil Code would appear to allow it. It says: "Civil Liability may be regulated by agreement, except in cases where the law expressly forbids it." It is true that the Civil Code does not directly apply to Commercial matters, but as such a contract is not forbidden, it would appear to be allowed. It should, however, be noted that by the Commercial Code, contracts are to be interpreted by the *lex loci contractûs*, unless such law is contrary to Portuguese Law or Public Policy (Art. 4 (1)) which might affect the question if the Bill of Lading containing an exemption of negligence was given in a country where such exemption was illegal.

In *Russia* the damage to cargo is assessed on *quasi* General Average principles on both ships (Art. 453), but is payable primarily by the captains of the ships and only when they are exhausted by the owners; in the case of a ship at anchor being run down by one under way, without negligence, the ship at anchor and her cargo recover one half of their damages from the ship under way.

In *Spain* the Law as to cargo damage where both are to blame is the same as in Italy (Art. 827), and in case of doubt the same as in Portugal (Art. 828). It appears to be illegal for an owner to contract himself out of his liability (Art. 620).

In the *Scandinavian States* (Denmark, Sweden, and Norway), under their new and practically identical Codes, no special provision is made as to cargo damage; the whole

matter rests on the discretion of the Court so far as the tort or damage, *ex delicto*, is concerned, but there does not seem to be anything in the Code to prevent the cargo suing the carrying ship on the contract. I have not found any decision as to the validity of the negligence clause; it is not a usual clause, so far as my personal experience goes, in Scandinavian Bills of Lading. As in Germany the remedy in tort against the other ship is against her owners, notwithstanding the ship is demised (Art. 275).

In *Turkey* and *Egypt* there is no express provision as to cargo, but it appears that both ships are liable to both cargoes in proportion to their respective values. It has been decided that an agreement that ship and cargo should each bear its own loss in cases which, under the general Law are General Average, is valid (8 R.I.D.M. 159), and therefore there seems no reason to suppose that a clause, exempting a shipowner from liability for the negligence of his servants, would be invalid.

The *United States* have, although deriving their law originally from Great Britain on this question, widely diverged from its present practice.

The principle laid down in the *Milan* (Lush, 358) about 40 years ago, that only half the damage could be recovered from the other ship, was never accepted in America (*The Atlas*, 3 Otto 302). And a shipowner cannot contract himself out of any liability he may have for the acts of his servants (*Re The Missouri S.S. Co.*, 6 Asp. 264, 433; *Liverpool and Great Western S.S. Co.* v. *Phœnix In. Co.*, 129 U.S. Rep. 397), even where the ship is a foreign vessel in whose country such a contract is legal (*The Brentford City*, 3 R.I.D.M. 364; 29 Fed. Rep. 373), and, indeed, since the decisions of these cases such a contract has been prohibited by legislation (Act of Congress 13.2.93, §§ 1, 2), but the same statute whilst prohibiting the special case practically enacts the general principle, as it lays down (§ 3), that if a shipowner uses due diligence to see the vessel is seaworthy when she starts on her voyage, both he personally and his ship are free from liability for "damage or loss resulting from faults or errors in navigation or in the management of the vessel." Prior to the passing of this Statute it was held that the owner of cargo damaged in a collision for which both ships were to blame, might elect to sue either ship for the whole amount (*The Atlas*, 3 Otto 302; *The Britannic*, 39 Fed. Rep.

395), or might sue both jointly, in which case the judgment should be against each for one half, but should also provide that if the plaintiff fails to recover the whole of one moiety from either, he might recover the balance of that moiety, in addition to the whole of the other moiety, from the other one (*The Alabama* and *The Gamecock*, 2 Otto 695; *The Doris Echhoff*, 41 Fed. Rep. 156), leaving the wrong-doers to settle the matter between themselves (*The Shubert* and *The Einer*, 45 Fed. Rep. 497), but it would appear that under the Statute quoted above, his chance of recovering anything from the carrying ship has vanished, and though the Statute was passed no doubt primarily in the interest of carriers of cargo, there does not seem to be anything in it to limit it to the case of carrying ships; doubtless before long some case, where it is set up as a defence to an action for damage by collision, will find its way to the Supreme Court of the United States, where an authoritative decision will be given on the point. The Statute does not include the case of live animals (§ 7), and probably for this reason, and also for others to be noted hereafter, does not apply to cases of loss of human life or personal injuries.

It would probably be mere waste of time to attempt to classify the Law on a subject as to which the Codes are silent in the various South American Republics, except Argentina and Uruguay, and we may best turn to consider the Law which comes home to everyone of us who attempts the shortest journey by sea, as to what his remedies are if he is injured, or what chance his family has of recovering some compensation should he unfortunately lose his life in a collision for which both vessels are to blame.

(III.) The question is not, as a rule, dealt with in the Commercial Codes, but is governed generally by the ordinary Civil Law, the difficulty as to stating it in any particular case rather arising from the different ways in which different States deal with a question arising on the High Seas between ships of different nationalities from one another, and very probably also different from that of the State into which the ships come, and where the injured person would probably wish to institute proceedings.

As there is a greater degree of uniformity between the Civil Law of the several States in cases where a person is injured or meets his death in consequence of the joint negligence of two parties than in regard to the Maritime Law of Collisions, it will probably be sufficient

here to draw attention to the Law on the subject in France, Great Britain, and the United States, though I hope if the Law of other States materially differs from all of these three we may hear of it. I would only observe here that in only the most recent Codes—Belgium, 1880 (231); Italy, 1883 (661); Spain, 1885 (834—838)—are these claims specifically recognized as giving a privileged claim against the ship or freight; in the two last mentioned the privilege ranks prior to that of damage to property.

In *France* it appears that the relatives of an innocent member of the crew and, *à fortiori*, of a passenger, can recover from either or both shipowners (*Simon Ullander* v. *Louvet*, 2 J.D.I.P 112, and 10 R.I.D.M. 754), whilst as contributory negligence does not in France constitute an absolute defence to an action, but only goes in mitigation of damages, the actual wrong-doer, *e.g.*, the officer who failed to keep a good look-out or gave a wrong order, might also recover something, at all events, from the other ship (*Recuillet et Chemin de Fer du Nord*, D.P., 1885, 1, 433). In the case of passengers and innocent members of the crew they may have contracted themselves out of their rights as against their own ship; but as the English doctrine of common employment has no place in French Law (*Cour de Cassation*, 2 R.I.D.M. 130, 180), in the absence of some special contract, the crew as well as the passenger could recover. A curious feature of French Law bearing on this subject is that an action for personal injuries, as being an action for a breach of a contract, express or implied, should be brought in the Commercial Courts, whilst an action by relatives for loss sustained by the death of a passenger or member of the crew, as being for injury to the estate, should be brought before the Civil Tribunals (C.C. 2 R.I.D.M. 130, 180).

In Great Britain it has quite recently been decided by the House of Lords (*Mills* v. *Armstrong*, 13 Ap. Cas. 1), that as regards the other ship, where a passenger or an innocent member of the crew is killed in a collision where both ships are to blame, their relations, within certain limits prescribed by Act of Parliament, can recover in full, but that anyone who has, by his own voluntary act, contributed to the collision can recover nothing. It is left in doubt still whether a member of the crew who has, in obedience to orders, contributed to the collision can recover or not; for example, a helmsman who has been told to starboard, and does so, when the proper course

would have been to port. Possibly his remedy may lie, not against the other ship, but against the officer who gave the wrong order.

As against their own ship the rights of the passengers' relatives are governed by the conditions of the passenger's ticket, which in all, or almost all, large lines of steamers preclude any liability, whilst the crews, whether innocent or guilty, are precluded by the doctrine of common employment, which, abolished in other trades by the operation of the Employers' Liability Act of 1880, still exists with regard to seamen.

In cases of personal injury the matter cannot be considered as settled. Until some authoritative decision of a Final Court of Appeal is given it must be doubtful whether the Law laid down in *Mills* v. *Armstrong* (*ante*) applies, or whether only half damages, as in the case of cargo (*The Milan*, Lush, 358), only can be obtained from the other ship; as regards their own ship the same rules as in the case of loss of life govern the case. It may be there is a difference between the Law of England and Ireland on the one hand, and that of Scotland on the other, but this depends on questions of Municipal Law, which it would be wearisome to discuss here.

In the United States, so far as I can learn from text-books and published reports of cases, the matter is in a peculiarly unsettled and therefore unsatisfactory condition.

It has been already pointed out that the American Courts of Admiralty have not adopted the British rule as to damages so far as a cargo, necessarily innocent, is concerned. None the less in other matters they have carried the principle of division of damages much further than in Great Britain, and applied it to all Maritime torts (*The Sterling* and *The Equator*, 16 Otto 667; *The City of Hartford*, 7 Otto 323; *The Serapis*, 8 U.S. Ap. Cas. 49), with, however, a possible relaxation where the contributory negligence was very slight or very gross (*The MacMorris*, 30 Davis Sup. Crt. Rep. 1; *Anderson* v. *The Ashbrooke*, 44 Fed. Rep. 124). Applying this principle to the case of collisions, it would appear that in cases of personal injury a member of the crew who had contributed to the collision could recover half his damages from the other vessel; but as the other vessel would have a personal action against him as well as against his owners for half her damages, if such an action were brought, it would in the result only benefit his owners, who would have to pay less by the

amount he had recovered and which the opposing ship would cancel by her claim against the actual wrong-doer.

As regards an innocent member of the crew or a passenger there seems no reason to suppose that their claims for personal injury would differ in principle from those of cargo owners so far as the other vessel is concerned, unless they have been differentiated by § 7 of the Act of 1892 already referred to. As regards their own vessel the same consideration would apply to passengers; with regard to the crew in some of the States the Doctrine of Common Employment is no defence (*Scarff* v. *Metcalf*, 3 R.I.D.M. 627).

With regard to claims for loss sustained through the death of a relative the case is different. There is no Statute of the United States giving a right to any damages in such a case any more than there was in England prior to the passing of Lord Campbell's Act in 1847. Several of the individual States have such Statutes, but the United States or Federal Courts have exclusive jurisdiction over parties responsible for loss of life or personal injuries on board ships at sea (Rev. Stat. U.S., Tit. XIII., ch. 7, § 629 (19)). The whole question has recently been much discussed in the Supreme Court, and it seems now to be decided that the Admiralty Courts have no jurisdiction *in rem*, and that for loss of life in a collision at sea there is no remedy (*The Harrisburg*, 12 Dav. Sup. Crt. 199; *The Alaska*, 23 Dav. Sup. Crt. 201). But that if the injury was inflicted within the territorial limits of a State where it gave a right of action such right could be prosecuted in the Admiralty Court by proceedings *in personam* (*Butler* v. *Boston and Savannah S.S. Co.*, 23 Davis Sup. Crt. 527; *The Corsair*, 38 Dav. Sup. Crt. Rep. 335); and from the last mentioned case it would appear that if the State Law gave a lien for such damage the Admiralty Court could enforce it.

(IV.) As to the limit of liability of shipowners we find again three different rules: First, that of the ship and freight itself, which, when the ship happens to be at the bottom of the sea and the freight is not earned, is not of much value; this limit is in force generally. At the time of the promulgation of the Napoleonic Codes there was much discussion in France as to whether a shipowner should be liable for the negligence of his servants to the whole amount of his property, or the whole amount of his Maritime property, or only to the amount of that portion of it of which the servants were in charge at the

time, and in the result it was settled in the last and most limited degree. This principle, which indeed was that of most Maritime States previously, probably from the difficulty of getting anything more out of a foreigner, and the injustice of treating natives worse than foreigners, has been incorporated into the Codes of almost all nations. Secondly, in Great Britain, for many years prior to 1862, the rule was that though the value of the ship and freight was the limit of liability, yet it was not the ship itself which was considered, but her value at the moment before the collision happened for which amount the shipowners' general property was liable. But in 1862, a different measure was established, namely, the purely empirical one, that where property only was concerned, the shipowner should be liable only for £8 per ton on the tonnage of his ship. An additional liability of £7 per ton was imposed to give compensation for loss of life or personal injury; a difference, not necessary to discuss here, being made between the measurement of sailing and steamships. This arrangement gives an advantage to foreign ships or ships owned singly by a Limited Liability Company, when they are in their damaged state, worth less than £8 or £15 per ton, as the case may be. As in the case of a foreign vessel, the owners of which are resident out of England, and cannot be served with process, the practical measure of damage must be the value of the vessel, whilst in the case of a Limited Company, whose sole property is the ship, it is obvious that no more can be got than the ship herself.*

In *Great Britain* this law of Limited Liability is held to apply to Foreign vessels if the owners can be served with process, and have property which can be taken in execution beyond the ship herself (*The Amalia*, Br. & Lush, 151).

In *France*, on the other hand, the Cour de Cassation has recently held that the British Law of Limitation attaches to the British ship when in collision on the High Seas. That in fact the limitation of a shipowner's liability is not governed by the *lex fori* as in England, but by the Law of the flag (19 J.D.I.P. 153, 1,130; 7 R.I.D.M. 242), whilst it appears doubtful if a British shipowner has any limit at all allowed him for a collision with a French ship in French

* That is, if the ship is uninsured; if she is insured, the well-known "collision clause" would no doubt be present in the policy to protect the Company.

waters* (*Burnett* v. *Abram & Ors.*, 21 J.D.I.P. 303). In *Belgium* the liability is held to be governed by the *lex fori* (8 R.I.D.M. 131).

It is obvious that, whether one ship alone is to blame or both, it is very important to the shipowner to know what his limit of liability is; it may well determine the captain's mind as to the port of distress he will make.

When British Law applies, it is of great importance both to ship and cargo-owners where the damages are large and the value of the ship small, that is, less than £8 per ton, in a case of both to blame, and where each vessel is primarily liable to pay half the damages of the other and of her cargo, to know whether the arbitrary limit of liability is to be applied to the actual claim for half or to the balance ascertained by setting off one ship's half against the other. It is now settled that the latter is the correct plan (*The Khedive*, 7 A.C. 795).

So far as I am aware, only one Maritime State altogether repudiates the idea of limiting a shipowner's liability in any way where collision damage is in question, and that is Portugal, under her new Code (Art. 492 (1)).

It had formerly been argued that, under the Spanish Law, a shipowner was under no liability for the acts of his servants on board ship in bringing about a collision, on the principle for which formerly Bynkershoeck contended, that the act of running down another vessel was no part of the duty which the captain and crew were employed to perform, but whether the contention was well founded or not is now only of archæological interest, as under the existing Spanish Code the liability of shipowners for collision is expressly enacted (Art. 837) up to the value of ship and freight.

There appears to be a curious point in Italian Law, which may largely affect the rights of cargo, in a case where both ships are to blame for a collision. As already pointed out, each ship is, under these circumstances, liable for the whole damage (*ante*, II. Italy), subject to the right of abandoning ship and freight, which is the limit of the owner's liability on the contracts of his master, as in other Continental States; but if the contract of carriage, instead of being a Bill of Lading signed by the master, is made with an agent of the

* At the Conference it was stated that a very recent decision of the Cour de Cassation at Paris had decided that in this case the British ship might claim the French limit.

company owning the ship on shore, there appears to be no limit to their liability, as they cannot in this case free themselves by abandoning or surrendering ship and freight, the case not being provided for in the Commercial Code, and the agent may be sued for the whole damage (4 R.I.D.M. 337; 16 J.D.I.P. 161; 5 R.I.D.M. 558), and, moreover, if successful in such action, any ships belonging to the company, even if the company be not an Italian one, can be taken in execution (2 R.I.D.M. 217; 8 R.I.D.M. 614).

It should also be observed that the right of limitation by abandonment does not apply in Russia (Arts. 253, 255) to tugs, which, where a vessel in tow is brought into collision by the joint negligence of her tug and of the other colliding vessel, may produce the same results both for ships and cargo that the special case above mentioned does for cargo in Italy.

Having now considered the main divergences of the Law of different States as affecting questions of collision where both ships are to blame, let us glance for a moment at the systems of application of these Laws in different States. Where one vessel alone is to blame for a collision, it makes comparatively little difference by what Law the case is decided; the only questions of importance there are the right of arresting the delinquent vessel, and the measure of liability of her owners. The former of these questions has recently been ably dealt with in a series of articles in the *Revue International du Droit Maritime*, and I do not propose to enter upon it here. The latter has been already referred to and has also been treated by Mr. Gray Hill, of Liverpool, in papers read at Plymouth and Norwich in 1891 and 1892.

When, however, both ships are to blame, it is clear that if they are of the same nationality there may be a vast difference in the result, if, on the one hand, their mutual liabilities are to be decided by the Law of their own flag or on the other by that of the country in which the case is tried, whilst if the ships are of different nationalities it might be in the highest degree unjust to apply to each the Law of her own flag. If, for example, a German ship and an English ship, after a collision in the North Sea, take refuge in Antwerp, and after trial are both found to blame, should the Law of the flags be applied to each, the English ship would be condemned to pay half the German's damage, and the German ship could not be ordered to pay anything. It is only necessary to state the case to show that this result would be iniquitous.

The case might be even more complicated if two vessels of different nationalities, after a collision for which both are to blame, take refuge in different countries. In this case we might possibly have examples of all the four leading rules. By what Law, then, are these cases to be decided? The question has occupied the attention of many jurists and congresses on the subject of International Law. On this part of the subject I should say that I am much indebted to Dr. Buzzati's exhaustive work, *L'Urto di Navi in Mare*, published in 1889. Referring to his own Italian Law, he quotes Art. 9 of the Civil Code (Preliminary) as confirming Art. 58 of the Commercial Code, and as showing that the Law of the place of collision is to be applied if the collision takes place in territorial waters, or, if both vessels are of the same nationality, the Law of that nation (p. 48). In *France*, *Valroger* and *Desjardin* state: "That when it is necessary to "decide a case between foreign ships of the same nationality, it "is conceived that as, strictly speaking, no French interest is "concerned, the Judge may refer to the Municipal Law of the "two ships" (*Valroger*, Dr. Mar., Vol. V., § 2,124, *Desjardin*, Dr. Com. Mar., Vol. V., § 1,121).

The Congress on International Law at Antwerp was of opinion that "Collisions at sea between two vessels of the "same nationality, are governed by their Municipal Law" (Acts of Con. Int., Antwerp, p. 145), and this view was accepted by our late distinguished *confrère*, M. Jacobs (*Avant-projet de Loi Mar.*, § 26), and by other jurists (Grasso *L'Urto di Navi*, Vol. XXXIX., p. 222, Gianzana, *Risposta*, pp. 19 and 20. Dr. Rossi and Novi Lena, *Osserrazione sul question III.*, Lebano *Con. Int. di Dir Com.*, § 9. Benfante *L'Urto di Navi*, Pt. III., Ch. V., § 1, p. 250). But Lyon-Caen is of opinion that: "Where out of territorial waters altogether it seems "reasonable to disregard the peculiar arrangement with regard "to doubtful collisions, and to hold the Law common to all "nations which only recognise in collisions either pure accident "or blame on the part of someone; this solution, indeed, "ought to be followed, in our opinion, even when the ships "in collision on the High Seas are both French" (*Etudes Dr. Int. Pr.*, Ch. VII., § 63). Where the collision is on the High Seas between vessels of different nationalities, Labbé, writing in the *Journal du Palais*, 1875, p. 241, and criticising a decision of the Cour de Cassation in Paris, which had applied French Law, the *lex fori*, to a collision

between a French and an English ship on the High Seas, after pointing out objections to that course and also to that of referring to some problematical common Law of the sea, proposes to leave all these cases to the sense of natural equity in the Court. "We propose," he says, "that the Judge "should rely on what is right only without the support of any "positive law. Yes, whilst making a true International Law "applicable to such suits. Is such a course unheard of? "Our legislature itself in requiring the Judge to decide in "cases where there is no positive law, invites him to supply it "out of his sense of right and the Law of nature in absence of written and published texts." *Valroger*, on the other hand, supports the decision of the French Courts in the above and other cases, saying, "the French Law appears to him to be "the only one applicable when the dispute is between "foreigners of different nationalities, and still more so "when between Frenchmen and foreigners, wherever the "collision happened, from the moment that a French Court is "called on to decide it" (J.D.I.P., 1887, p. 734).

Desjardin propounds another plan, as follows :—"The "question is less simple if the two Laws are not alike. It would "be equitable and just in this case to apply the Law of the ship "which is run down. Between the doer of the wrong and "the victim of it I have no hesitation. The running down "ship may certainly if he loses the case be involved in "liabilities beyond what he anticipates; but it is better that "his calculations should be upset than those of the vessel "which is run down. The latter in making his estimate of "the damage is entitled to expect reparation in conformity "with his own Law, and to regulate his proceedings on that "assumption. If indeed it were more to his advantage to "claim by the Law of the running down ship he should not be "allowed to take advantage of it. He cannot claim to be better "than if he had been run down in the waters of his own country "by a ship sailing under his own flag. The legal complexity "is redoubled when the question is of a mixed or doubtful "collision between two ships of different nationalities, "that is to say, if, strictly speaking, neither vessel runs "down, nor is run down. I shall propose to apply in this "last case that Law which is nearest to general principles "of ordinary Law" (*Dr. Com. Mar.*, Vol. V., § 1,121). Seeing the difficulty of this final proposition, as it would be necessary in the first instance to ascertain what were the

general principles of ordinary Law common to all or most nations, *Benfante* (*Urto di Navi*, Pt. III., Ch. II., § I., p. 58) says: "It cannot be permissible to apply a Law which is more advantageous to one of the ships and less to the other, rather recourse should be had to that which occasions the least hardships to both vessels." The Congress at Antwerp adopted a scheme which is again different, as it binds each vessel to pay or receive no more than the Law of its own flag allows, whereas the logical outcome of *Desjardin's* suggestion would be that in cross causes each vessel would be bound as plaintiff, *i.e.*, in so far as it was the sufferer by the Law of its own flag, and as defendant, *i.e.*, in so far as it was the wrong-doer by the Law of the other ship's flag. *Jacobs*, in supporting the Antwerp scheme, confines himself to the case of doubtful collisions, what we call in Great Britain inscrutable fault. He says: "In the case of a doubtful collision there "is no reason for preferring one Law to another, since there is "no blame to cause the balance to lean in either direction. It "is necessary then to find some means to put both ships on an "equal footing. There are two ways of doing this, either to "say that that Law which is most unfavourable to the debtor "shall always apply, or to say, as the (Antwerp) Commission "proposes, that between the two Laws which are in conflict, "the one which is most favourable is to be preferred. "To bring them to the same common denomination, and to "keep the two vessels in collision on an equality it is "necessary to apply to both of them either the higher or "the lower level. On legal principles the lower level is the "one preferable. When a person has come into collision with-"out any fault being shown, and has done more damage than "he has sustained, what right is there to compel him to give "compensation on the higher level?" *Dr. Buzzati* finally proposes still another method of doing justice, that "the two "ships should have one half of the total amount of the damages "divided according to the law of one ship, and the other "half according to the Law of the other ship" (p. 63).

To pass from theory to practice, the plan adopted in Great Britain has at all events the merit of simplicity, acting on the general principle that the right is governed by the Law of the place where it originated, and the remedy by that of the place where it is to be enforced (Story, *Conflict of Law*, § 558), and applying it to the case of collisions we have the facts of the collision governed by the Law of the place, that is, by the

general Law of the sea, and as no one yet has been able to say what is the general Law of the sea upon a variety of points, we assume that it is the same as that Law of the sea adopted by British Municipal Law. Whilst the remedy, that is, the extent of liability, is always governed by our Municipal Law, hence in all cases of collision at sea we cease to be troubled by the Law of the flag, the cases are decided as to merits on our interpretation of the International Rules for Preventing Collisions at Sea, the liability is, on paper at all events, £8 or £15, as already explained.

In *Belgium*, after much discussion, it seems to be now accepted that the Courts will entertain a cause of damage between foreign vessels on the High Seas (18 J.D.I.P. 1010; 20 J.D.I.P. 221), or even in foreign waters (18 J.D.I.P. 269; 20 J.D.I.P. 942, 944); in the first case, it can only be said to be decided that if both vessels are of the same nationality, the Law of the country will be applied as to the incidence of damages (20 J.D.I.P. 221), and in the latter, the Law of the country in whose waters the collision causing the damage took place (8 R.I.D.M. 123), but, in any case, the owner of a vessel found to blame, can free himself from liability by an abandonment of ship and freight in accordance with Belgian Law (20 J.D.I.P. 221), and an action nominally against the captain binds neither him nor the owner personally, but is only available against the ship (8 R.I.D.M. 587). But in all questions relating to foreign ships, the Belgian Courts will do nothing unless it is shown that similar suits relating to Belgian vessels would be entertained in the Court of the foreign ship (20 J.D.I.P. 443; 4 R.I.D.M. 189).

In *France*, it was decided by the judgment of the Cour de Cassation already mentioned, as criticised by M. L'Abbé, that the French Courts would entertain actions for damage by collision in French waters where both ships were foreign, and will decide the case, at all events when the ships are of different nationalities and under different Laws, by the Law of France (19 J.D.I.P. 1,133), and it appears that this is also the case wherever the cause of action arises, even if in foreign territorial waters (19 J.D.I.P. 659). A peculiar rule as to the limit of foreign vessels' liability has already been referred to.

In *Germany* there seems to be no doubt that the Courts, as in England, will entertain a suit for a collision independent of the place where it happens. It has been decided that such a collision happening between foreign vessels in German waters

is decided by the *lex fori*, or German Law (*Reichsgericht*, 16 J.D.I.P. 856; 14 J.D.I.P. 339; 17 J.D.I.P. 332), and it is inferred in these cases that it would be decided by that Law in all cases even if the collision happened in foreign territorial waters, but a recent decision at Hamburg (*Trib. Sup. Hanseatique*, 19 J.D.I.P. 1,037) does not indeed decide, but seems to imply that a defendant brought before a German Court might claim to be tried by his own Law. In a case where one ship was Spanish and the other English, the replication to a defence of compulsory pilotage that it constituted no defence in Spanish Law was held bad (17 J.D.I.P. 332), thus concurring with the British decision in the *Halley* (L.R. 2 P.C. 193), though on somewhat different grounds.

In *Italy*. In cases of collision between foreign vessels in Italian waters, Italian Law has been applied (C.C., Turin, 14 J.D.I.P. 241; C.C., Florence, 17 J.D.I.P. 963), and from the analogy of salvage cases (C.A., Genoa, 2 R.I.D.M. 214; C.A., Messina, 3 R.I.D.M. 766), this would appear to be the case wherever the collision happened. The Law of Italy is, however, in a very unsettled condition, as when the Italian States were amalgamated into the Kingdom of Italy, several kept their own final Courts of Appeal or Cours de Cassation, and the decision of one of these on the interpretation of the Code does not bind the others. Hence, amongst other matters relating to collisions, there are divergent practices in the North and South as to the person before whom a foreign shipmaster must make the depositions necessary to preserve his right of action for collision damage (C.C., Turin, 17 J.D.I.P. 380; C.A., Naples, 3 R.I.D.M. 97); and quite recently the Court of Appeal at Genoa has held against the power of an owner to contract himself out of liability for the acts of the master and crew (9 R.I.D.M. 82), whilst several of the Cours de Cassation have freely allowed it. There are Cours de Cassation at Turin, Florence, Rome, Naples, and Palermo. Possibly, as the Commercial Tribunals have been recently abolished, and a distinguished lawyer is now again Prime Minister, means may be found of crowning the edifice of Italian Unity by giving her not only one Law but some authoritative interpretation of that Law.

In *Spain* it has been decided that the Spanish Civil Court has jurisdiction over collisions where one (S.C. Madrid, 16 J.D.I.P. 144; 19 J.D.I.P. 275; 7 R.I.D.M. 603) or both

(20 J.D.I.P. 506) vessels are foreign, provided the collision takes place in Spanish waters. There does not appear to have been any decision as yet on the new Code as to jurisdiction over a collision between foreign vessels on the High Seas. In the cases above mentioned, Spanish Law was applied, it is however, rather to be gathered from the cases referred to that a Spanish Court would not entertain a cause of collision between foreigners on the High Seas.* As moreover there is no power to arrest a foreign ship prior to judgment, it seems unlikely that such a case would be brought before a tribunal, when in almost every instance the vessel would have gone away before judgment could be enforced against her.

In *Egypt*, the International Tribunals have managed to curtail their jurisdiction in collision cases to the extent that they will not entertain a cause unless the defendant is either actually domiciled or has a branch business—a mere agency is not sufficient—in Egypt (7 R.I.D.M. 599), and as these Courts only have jurisdiction where one or both parties to the litigation are foreigners (*Règlement D'Organisation Judiciaire*, Arts. 9, 10), the practical result is that they can only entertain cases where the claim is by a foreign vessel against one under the Egyptian flag.

In the *United States* of America the Courts, as might be anticipated, adopt generally the British view of the jurisdiction, and refer, at all events when the collision occurs on the High Seas or in American waters, to the same hypothetical General Maritime Law which is, in the absence of other proof, deemed to be the Maritime Law as interpreted by their Municipal Law. It has been pointed out that there are notable divergences between the law of the United States and Great Britain as to liability, and that they are more likely to increase than diminish under the influence of recent legislation.

I have now dealt with the principal points of divergence, leaving out of consideration, for want of time and fear of being wearisome, many other important matters, such as the effect of compulsory pilotage on liability, the degree of adherence to the International Rules required in different countries, and the questions of the differing circumstances

* I was informed at the Conference by a member that he personally was acquainted with a case at Cadiz where the Court had declined jurisdiction in such a case.

under which blame is presumed, or where the onus of proof is laid.

I hope, however, I have drawn attention to the painful conflict of Laws on a matter which concerns not only lawyers and seamen, but every merchant and every traveller, and though in a paper which attempts to deal with the Laws of all civilised nations, I have doubtless made mistakes, I hope those who have listened to the paper, or those who may read it, will forgive the errors and accept the intention which is to show how important it is, that as we have had now for over 30 years one common set of regulations for Preventing Collisions at Sea, we should now have one common rule as to the incidence and limitation of damages for breaking those rules.

F. W. RAIKES.

ABBREVIATIONS USED.

J.D.I.P. = Journal du Droit International Privé.
R.I.D.M. = Revue International du Droit Maritime
D.L. = Dalloz—Lois, &c., of France.
C.C. = Cour de Cassation.
C.A. = Cour d'Appel.
S.C. = Supreme Court.
(Art.—). = Art. of Commercial Code of the State.

II.

SHIPPING GAZETTE AND LLOYD'S LIST.

JULY 26, 1894.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

COLLISION.—THE STEPHANOTIS (S) v. THE HORTON (S).

(Before the Master of the Rolls, Lords Justices KAY and A. L. SMITH, and Captain KNOX, R. N., and Captain PARFITT, Nautical Assessors, July 24, 1894.)

This was an appeal from the decision of the President of the Admiralty Division in an action of collision in which the plaintiffs were the owners of the steamship *Stephanotis*, and the defendants the owners of the steamship *Horton*. The collision occurred in the River Tyne, on the afternoon of March 17, 1893, when the *Stephanotis*, a steamship of 1,045 tons gross register, and manned by a crew of seventeen hands, was proceeding up the river in ballast. The *Horton* is a steamship, belonging to London, of 1,187 tons net, and 1,827 tons gross register, with engines of 180 horse-power nominal, and she was bound from the Tyne to Bilbao with a cargo of coal and a crew of twenty hands.

The case for the *Stephanotis* was that she was keeping well over to the north side of the navigable channel, and was making from two to three knots an hour, the tide being first of the ebb, of from one to two knots' force. Snow was falling heavily when the *Horton* was observed *about 250 yards off*, and well into the buoys known as Smith's Buoys, on the north side of the river, and in such a position as to make it impracticable for the *Stephanotis* to pass up between the *Horton* and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the *Hor-*

ton, which was seen to be approaching as if under a port helm. The *Stephanotis* kept her helm a-starboard and her engines going full speed ahead as the only means of avoiding a collision, but the *Horton* struck her a heavy sliding blow on the starboard side, doing her such damage that she had to put ashore on the south side of the river to prevent her sinking. The plaintiffs argued that the *Horton* was wrongly navigated on the north side of the river, and that she attempted to cross to the southward when it was unsafe to do so.

The case for the *Horton* was that she was keeping to the south of mid-channel, and going down the river at the rate of about four knots over the ground. In these circumstances, the *Stephanotis* was seen coming up the river, about half a mile away, and bearing right ahead. The *Stephanotis* thereupon blew one blast, to which the *Horton* replied with a short blast, and then ported and steadied her helm. When the vessels were in a position to pass clear port to port, the *Stephanotis* blew two short blasts, and the *Horton*, after replying with one short blast, again slightly ported her helm. The *Stephanotis*, however, blew two more blasts, and as she was then seen to be under a starboard helm, the *Horton's* whistle was blown a short blast, and her engines were set full speed astern; but the *Stephanotis* struck the *Horton*, doing her great damage. The contention of the defendants was that the *Stephanotis* was wrongly navigated on the south side of the channel, and that she improperly starboarded across the *Horton's* bows. Sir Francis Jeune found both ships to blame. He held that when the *Stephanotis* saw the *Horton* in the position she alleged, she ought to have stopped, and certainly ought not to have gone on full speed ahead. The learned Judge also expressed the opinion that the *Stephanotis* had a bad lookout, and observed that there was considerable discrepancy between her story as related in the pleadings and as given in evidence. With regard to the *Horton*, the learned Judge held that when she heard the two first blasts of the *Stephanotis*, and the vessels were approaching each other at something like end on, the *Horton* ought to have stopped and reversed, or at any rate to have stopped. In these circumstances, he

pronounced the *Horton* to blame as well as the *Stephanotis*. The owners of the *Horton* now appealed, it being contended that those who were navigating her were reasonably entitled to expect that the *Stephanotis* would obey the Tyne rule, and go the northward, and that there was sufficient time for the *Stephanotis* to port her helm after hearing the signal of the downcoming ship. It was maintained that the collision was entirely brought about by persistence in starboarding on the part of the *Stephanotis*.

Sir Walter Phillimore and Mr. Butler Aspinall appeared for the owners of the *Horton*, in support of the appeal; Mr. Aspinall, Q. C., and Mr. H. Holman for the owners of the *Stephanotis*.

The Court allowed the appeal, and pronounced the *Stephanotis* alone to blame.

The Master of the Rolls, in giving judgment, said:

The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the *Stephanotis* to have ported after the *Horton* blew one blast, and that the master of the *Horton* might reasonably have expected that he would do so. When the master or pilot of the *Horton* heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm put to port, or to have ceased starboarding, and then they would have gone clear. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the *Horton* to have stopped and reversed, or stopped even at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the *Horton*, but must have been for some other reason, and

that the master and pilot of the *Horton* might reasonably have supposed that, when if anybody had looked, they must have seen the *Horton*, and must have known that the *Horton* was porting—they had a right to suppose that the *Stephanotis* would stop starboarding immediately, and would have ported her helm. If so, it was not unreasonable and unseamanlike, I think, for the *Horton* to keep on as she did. By the time that two ships' lengths were passed over by the two vessels approaching each other—that is, the time of the second blast—the collision was inevitable. It seems to me that the judgment of the President and the advice of his Trinity masters was too severe. It was requiring men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the *Stephanotis* ought to be held solely to blame.

Lord Justice Kay: I also think that the learned Judge has dealt with the master of the *Horton* very hardly indeed. The facts are simple. The *Horton* was going down the River Tyne upon the ebb tide, and the *Stephanotis* was coming up the river against the ebb tide. The learned President has found that the *Horton* was, in fact, upon her own side of the river, south of the mid channel line, and that the *Stephanotis* was also over the mid-channel line, but only a little beyond it, so that the *Stephanotis* was not out of her proper water. They were meeting nearly end on, not quite, because they were a little port to port as they were meeting. The *Stephanotis*, when they were four ships' lengths off, blew two blasts, which meant that she was going to starboard. She did in fact starboard, and the captain of the *Horton* saw that she did, but for a moment he hesitated to think that she could possibly be going to maintain that course, and in that moment of indecision the ships, of course, came nearer to one another. The *Stephanotis* blew two short blasts again, showing that she meant to persist in her starboard course, and he then repeated his one short blast and stopped and reversed his engines. If he was in fault, he was only in fault because he did not stop and reverse

the engines when he first got the intimation that the *Stephanotis* was going to starboard. The rules of the River Tyne are very plain indeed. Rule 19 says that every vessel under weigh, proceeding seaward shall keep to the south of mid-channel, and vessels going up the river shall keep to the north of mid-channel. The 22d Rule says that steam vessels proceeding in opposite directions and approaching one another shall keep on their proper side, and, if necessary, slacken speed—vessels going against the tide in all cases giving way to one going with the tide. When steamships approach so as to cause risk of collision, they are immediately to port, and, if necessary, the engines are to be stopped and reversed. The *Stephanotis* disobeyed every one of these rules. I confess I think that the master of the *Horton* is to be forgiven if he could not believe, and did not believe, that she meant to persist in crossing his bows, as it was indicated by the first two short blasts that she might be intending to do. He did not believe at once that she intended to persist in that, and it is, I think, very clear, as our nautical assessors advise us, that there was time for the *Stephanotis* to have altered that intention. She was coming up against the tide, thoroughly under command of her helm, and after she heard that one blast given by the *Horton*, if she had altered her intention and changed her course, as she might then have done, there would have been no collision. If she had stopped and reversed, the collision might have been prevented even at the last moment, but she did nothing of the kind, and persisted in this extraordinary maneuver. She did not stop and reverse, and it seems to me that the fault was entirely hers. It is not a question, as the Master of the Rolls said, whether the master of the *Horton* did the best thing that could have been done, but whether he was guilty of any want of seamanship. We are advised, and it certainly seems to me, that he is not to blame, under the circumstances, for doing what he did. The *Stephanotis* was solely to blame, and the master of the *Horton* ought to be absolved.

LORD JUSTICE A. .L SMITH: There can be no doubt in this case that those in charge of the *Stephanotis* were to blame. Nobody says they were not. The learned Judge says they were, and there is no appeal against that finding. But it is said that those in command of the *Horton* are also guilty of neglect, and guilty of faulty and bad seamanship in not stopping and reversing at an earlier period. It is said that when those on board the *Horton* heard the first two blasts which came from the *Stephanotis*, the captain and those in charge of the *Horton* should then and there have made up their mind that the *Stephanotis* was going to perform the act which she did. The nautical assessors advise us that if the *Stephanotis* had not persisted in the manoeuver that she did persist in, and had gone back to port helm, everything would have gone well. Therefore, in my judgment, there is no negligence on the part of the *Horton* in not having made up her mind instantly that the *Stephanotis* was going to act as she did. In my judgment it has not been made out that the *Horton* has been guilty of negligence, and therefore the *Stephanotis* should be held solely to blame.

No. 66 and 67.

Rec Supreme Court U.S.
FILED.
DEC 17 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

CANTON INSURANCE COMPANY, LIMITED, and others AGAINST JOHN McINTYRE, JR., and others.	No 66.
JOHN McINTYRE, JR., and others AGAINST CANTON INSURANCE COMPANY, LIMITED, and others.	No. 67.

Memorandum on Behalf of Canton Insurance Company and Others.

The owners of the *Victory* were permitted by the District Court to deduct from the appraised value of their vessel the costs incurred by them incident to establishing their right to limitation of liability (*Decree, p. 464*). The propriety of such allowance has never been questioned.

The owners of the *Plymothian*, being entirely successful in the District Court, were awarded costs, not only those purely incident to limitation of liability, but also those incident to establishing their freedom from fault. The total amount was $1,681.80, one-half of which was charged against the underwriters of cargo and one-half of which was charged against the owners of the *Victory* (*Decree, p. 465*). In respect of the one-half charged against the owners of the *Victory* the District Court submitted to the Appellate Court the question whether

such item should be paid out of the appraised value of the *Victory* or out of the pockets of her owners *(Deevee, p. 465)*.

The appraised value of the *Victory* had nothing whatever to do with the costs then under consideration. The appraised value was in an action which had been instituted by the owners of the *Victory* for limitation of their liability. The costs, on the other hand, were incurred in the independent action instituted by the owners of the *Plymothian* for limitation of their liability, and were incurred by the *Victory* in unsuccessfully contesting such action.

The owners of the cargo were compelled to pay out of their pockets one-half of the *Plymothian's* costs, and the owners of the *Victory* should pay out of their pockets the other half. If the owners of the *Victory* had not voluntarily appeared and contested the petition of the owners of the *Plymothian* for limitation of liability, they would not have been subjected to costs. Having thus appeared and contested, they should pay the costs.

WILHELMUS MYNDERSE,
Advocate for Canton Insurance Company.

Nos. 66 & 67.
Brf. of city matters for Petitioners
Filed Oct. 14, 1895
No.

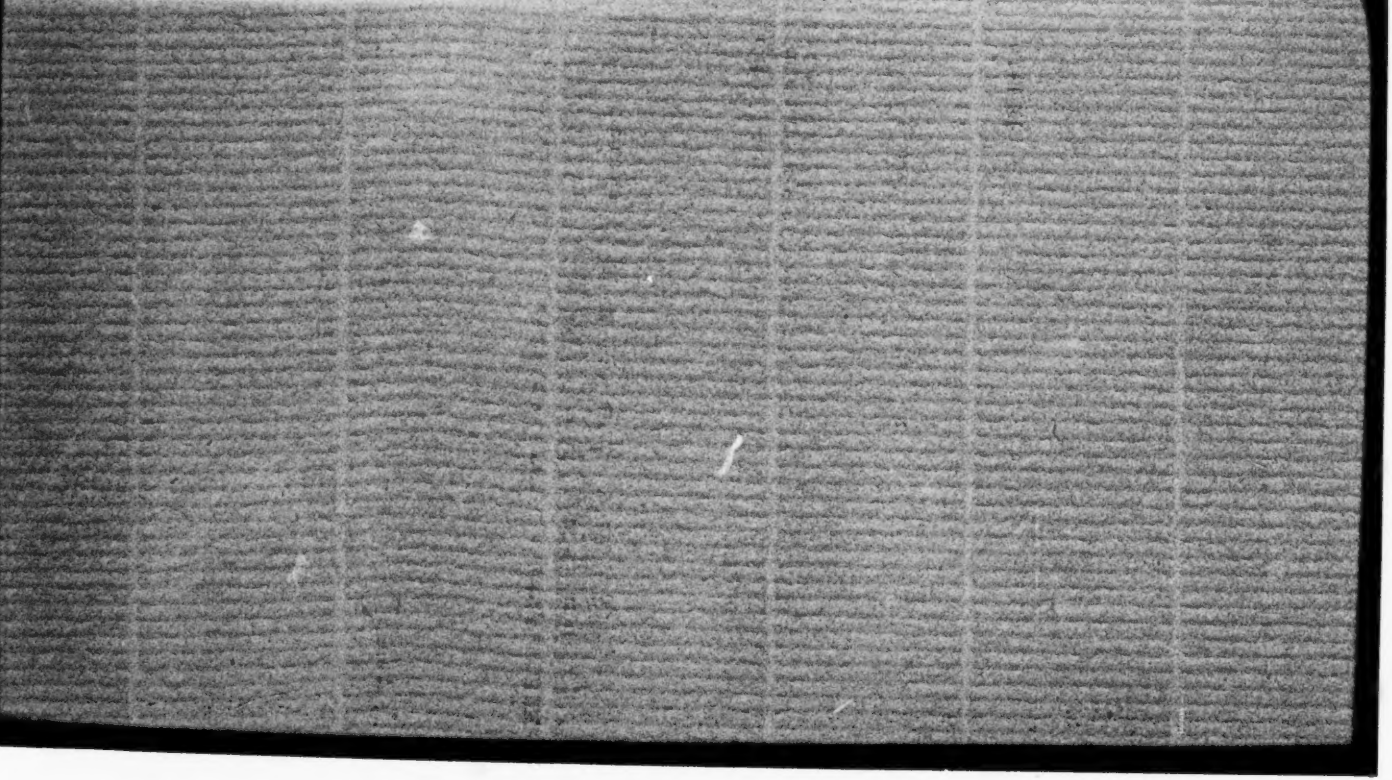
United States Supreme Court.

In the Matter of the Petition of the PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Claimant of the steamship PLYMOTHIAN, for a Writ of Certiorari.

In the Matter of the Petition of JOHN MacINTYRE and others, Claimants of the steamship VICTORY, for a Writ of Certiorari.

Brief in opposition to the Petitions.

BUTLER, STILLMAN & HUBBARD,
Proctors for Plymothian's Cargo.



Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.	No. 757.
IN THE MATTER OF THE PETITION OF JOHN MACINTYRE, JUNIOR, AND OTHERS, CLAIMANTS OF THE STEAMSHIP VICTORY, FOR A WRIT OF CERTIORARI.	No. 758.

Brief of the Canton Insurance Company, Limited, and others, owners of the Plymothian's cargo, in opposition to the foregoing petitions.

On the 12th day of November, 1891, the steamships *Plymothian* and *Victory* came into collision near the mouth of the Elizabeth River between Lambert's Point and Craney Island Light.

At the time of the collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea. She had left Galveston November 1st with a cargo of 3,682 bales of cotton bound to Liverpool, and had in the prosecution of that voyage come in through Hampton Roads and taken coal at Lambert's Point.

By the collision the port side of the *Plymothian* was cut below the water line amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged. The *Victory* sustained damage about her bows, which necessitated repairs.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamship instituted proceedings for limitation of liability.

The value of the *Victory* was appraised at $67,500 and her owners gave stipulation for that amount with sureties resident in New York.

The value of the *Plymothian* was appraised at $33,350 and the value of her freight at $11,871, making a total of $45,221, which has been reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. This has been fixed by consent at $5,000, leaving the limit of her owners' liability at $40,221. Stipulation has been given by the owners of the *Plymothian* with New York sureties.

In response to citations issuing in the above proceedings, the damages arising out of the collision were assessed. The damages sustained by the owners of the *Victory* were assessed at £2,951 12s. 4d., or about $14,500. The damages sustained by the owners of the *Plymothian* were assessed at £8,565 10s. 6d., or about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo were assessed at £14,656, or about $72,000.

The District Court held that the collision was due solely to the fault of those navigating the *Victory*, but that it occurred without any fault of privity on the part of the owners of the *Victory*.

Record, Opinion, pp. 447-458.

The Court further held that the *Plymothian* was in fault for not carrying a lookout, but that such fault did not contribute to the collision *(Record, Opinion, pp. 455, 456)*.

A final decree was accordingly entered October 30, 1894, by which it was decreed that the owners of the *Victory* should have the benefit of the limitation of liability provided by the statutes of the United States, and that the amount of her appraised value be paid ratably to the owners of the *Plymothian* and the owners of the *Plymothian's* cargo in the proportion of the amount of their adjudicated claims *(Record, Decree, pp. 463, 464)*. This gave a dividend of about fifty per cent. upon the amount of the claims.

Appeals were taken from this decree, which came on for hearing before the United States Circuit Court of Appeals for

the Fourth Circuit. That Court held that the collision was due to the fault of those navigating the *Plymothian* as well as to the fault of those navigating the *Victory*, though the greater degree of fault was found to be with those navigating the latter steamer *(Record, Opinion, pp. 498–504)*; and accordingly a decree was entered giving to the owners of the *Plymothian's* cargo a decree for all their damages, to be paid by the *Victory*, to the extent of her value, and the balance to be paid by the *Plymothian (Record, Decree, pp. 513–515)*.

The petition of the Port of Plymouth Steamship Company, owner of the Plymothian, for a writ of certiorari, should be denied.

The writ is petitioned for upon two grounds:

First, that the *Plymothian* was not in fault for the collision.

Second, that the owners of the *Plymothian* were relieved from any liability by the terms of the bills of lading.

First.

THE PLYMOTHIAN WAS IN FAULT AND HER FAULTS CONTRIBUTED TO THE COLLISION.

A. She should have maintained a proper lookout.

She had no one regularly stationed as lookout. Neither her master nor her pilot heard more than one signal of two blasts from the *Victory*.

It is entirely clear that two such signals were blown. Aside from the proofs that came from the *Victory's* witnesses, several of the witnesses produced on behalf of the *Plymohtian* testified that the *Victory* twice blew a signal of two blasts *(Record, John J. Clark, p. 338; Joseph M. Clark, p. 401; Wynne, p. 404; Goodwin, pp. 373, 374)*.

These witnesses, produced by the *Plymothian*, were not as favorably situated for hearing the *Victory's* signals as a lookout on the *Plymothian* would have been.

It is impossible for the *Plymothian* to say that, if there had been a lookout stationed for the special purpose of watching

for vessels and their signals, he would not have heard *all* the signals that the *Victory* gave.

It is equally impossible to say that if the pilot of the *Plymothian* had heard the signal which the *Victory* gave, or if it had been reported to him by a lookout, he would not have earlier recognized his danger. Recognizing his danger, he would have assured safety, either by yielding to the demands of the *Victory*, unreasonable as they were, or by slowing, stopping and reversing his engines and keeping out of the collision.

The rule is that when a clear duty is omitted the burden rests upon the negligent vessel of establishing affirmatively that the omission could not have contributed to the collision.

"In such a case the burden rests upon the ship of showing "not merely that her fault might not have been one of the "causes, or that it probably was not, but that it could not have "been."

The Pennsylvania, 19 Wall., 125.
City of Washington, 92 U. S., 31, 36.

Under cross-signals, it was the duty of both steamers to act instantly for safety; a duty which was recognized by the *Plymothian* when at a later stage she did hear a cross-signal from the *Victory*.

International Rules of Navigation, Art. 18.
U. S. Revised Statutes, § 4233, Rule 21.
Pilot Rule III.
The Baltimore, 56 Fed. Rep., 125.
The Knight, 43 Fed. Rep., 895.
The Aurania, 29 Fed. Rep., 127.
The Frisia, 28 Fed. Rep., 249.
Marsden on Collisions, 2nd Ed., 381–397.

B. The *Plymothian* should have stopped and reversed her engines earlier than she did.

If the *Plymothian* had heard the first signal of two blasts which the *Victory* blew, she would have stopped and reversed then; and if she had stopped and reversed then she would have avoided the collision.

The duty was imposed upon her not only in adjudged cases, but by Pilot Rule III., duly proved in the case *(Record, p. 431)*.

The obligation rested upon the *Plymothian* at once upon the cross-signal being given, to signify by other signals the lack of understanding between the two vessels and to put herself into immediate control by reducing her speed.

The Circuit Court of Appeals found the *Plymothian* in fault for "stubbornly adhering" to her side of the channel and for "doggedly" keeping her course without taking any precaution whatever until too late *(Record, Opinion, pp. 501, 502)*.

And she was found in fault for not earlier giving signals and for not reversing. The Court in fact say:

"We cannot find anything in this record which shows *any* "*precaution* taken by the *Plymothian* when she saw the *Victory* "disregard her signals. * * * The only thing which she "did was to repeat the disregarded signal. Even that was not "done until it became too late to avoid a collision. Under "these circumstances it is impossible to say that the *Ply-*"*mothian* is free from fault" *(Record, Opinion, p. 503)*.

The fact that the *Plymothian* carried high speed at the time of the collision is proved by many witnesses *(Record, Candlish, p. 41; Gilbert, p. 81; Middleton, pp. 96, 97; Scott, p. 109; Stewart, p. 119; Elcoate, p. 140; Swayne, p. 292; Pratt, p. 307; Page, p. 314; Nelson, p. 340)*.

Second.

THE BILLS OF LADING DO NOT RELIEVE THE OWNERS FROM LIABILITY.

It is a fact that all the bills of lading contain what is known as the "negligence clause;" but the position of this Court in respect to such a clause is thoroughly established.

Liv. & G. W. S. S. Co. vs. Phœnix Ins. Co., 129 U. S., 394.

Certain of the bills of lading also contain the "flag clause," to wit, "This contract shall be governed by the law of the flag "of the vessel carrying the goods" *(Record, Stipulation, p. 483)*.

We submit that a printed reference in a general bill of lading to the "law of the flag" is an unreasonable condition and void. A reference to the law of a specific country to which the goods were bound might be sustained, for then the shipper would know just what law he might expect to be administered in governing the contract. When, however, reference is made

to the law of the flag of the carrying vessel and the bills of lading contain, as these did, license to forward "by any other steamship or steamship company" *(Record, pp. 489–496)*, it is apparent that the shipper is deprived of all opportunity of knowledge as to the law governing the contract.

The statement in the *Plymothian's* petition respecting the bills of lading is not quite complete. The petition says:

> "It will appear by stipulation and exhibit *(pp. 483–498)* "that every bill of lading *issued by the master of the Ply-* "*mothian* for the cotton constituting this cargo and injured as "a result of this collision, contained two clauses familiarly known "as the 'negligence clause' and the 'flag clause.'"
>
> *Petition, p. 14.*

The petition omits to state that of the 3,642 bales shipped, only 1,671 were covered by bills of lading "*issued by the master by the Plymothian.*" The greater portion of the cargo, to wit, 1,971 bales, was covered by inland bills of lading issued by railroad companies, providing for through transportation from the port of shipment to Liverpool. None of these bills of lading contain the "flag clause," and they were the only bills of lading touching the 1,971 bales which were ever received by the shipper *(Record, Stipulation, p. 483)*.

The master of the *Plymothian* in receiving these 1,971 bales fsom the railroad companies, did issue a receipt containing the "flag clause," but that was something of which the shippers had no knowledge.

The whole question of the bills of lading is entirely immaterial, inasmuch as *less than half the cargo* is touched by the "flag clause." As the *Plymothian* is only held partly in fault, and cannot in any event, because of her insufficient value, be called upon to pay one-half of the cargo's damage, the question of the application of the "flag clause" is entirely immaterial.

The petition of John MacIntyre, Junior, and others, owners of the Victory, for a writ of certiorari, should be denied.

The petition is applied for on two grounds:

First, that the International Rules of Navigation did not apply in the locality of the collision.

Second, that the *Plymothian* should bear one-half of the cargo's damages up to the limit of her value.

First.

THE VICTORY WAS SO CLEARLY IN FAULT IT IS UNNECESSARY TO DETERMINE WHAT RULES OF NAVIGATION APPLIED. SHE WAS IN FAULT FOR STARBOARDING HER HELM AND FOR ADHERING TO THE EAST OR PORT SIDE OF THE CHANNEL AND FOR NOT EARLIER REVERSING HER ENGINES.

A. The International Rules require, when two vessels are meeting end on or nearly end on, each shall alter her course to starboard—that is, port her helm.

23 U. S. Statutes at Large, Chap. 354, Art. 15.

And they further provide that in narrow channels every steamship shall keep to that side of the mid-channel which lies to the starboard side of the vessel.

23 U. S. Stat. at Large, Chap. 354, Art. 21.

The *Victory* violated both of these rules.

The act establishing these International Rules provides that they shall apply upon the high seas and in all coast waters of the United States, and repeals all laws inconsistent therewith except as to the navigation of vessels in the harbors, lakes and inland waters of the United States.

If the locality of the collision was not in the "coast waters," but in "inland waters," then the provisions of Section 4233 of the Revised Statutes of the United States apply. That section promulgated "rules for preventing collisions on "the water," and it makes exactly the same provisions as the International Rules respecting vessels meeting in a channel end on, or nearly end on.

U. S. Rev. Stat., Sec. 4233, Rule 16.

Under such rules the *Victory* should have ported, instead of which she starboarded.

Exactly the same regulation is found, if it is argued that the vessels should be governed by the Inspector's Rules for Pilots.

Rule I. provides that when vessels are approaching each other head and head, or nearly so, each shall pass to the right *(Record, p. 344)*.

This required the *Victory* to port, instead of which she starboarded.

Rule II. imposed the same obligation upon her of porting in case the vessels were approaching each other in an oblique direction instead of end on *(Record, p. 431)*.

So far as local custom is concerned, such custom is in exact accord with the terms of the International Regulations. Whether the custom is older than the regulations, or whether it is a custom that has grown out of the regulations, does not appear; but in one way or another it is firmly established. By such custom vessels bound up and down the Elizabeth River are required to take that side of the mid-channel which lies to the starboard *(Record, Mardon, pp. 268, 269, 270, 277, 280; Henley, p. 372; Tweddle, pp. 325, 326)*. And the custom was known to the master of the *Victory* (Record, Alcot, pp. 151, 152). The pilot of the *Victory*, though examined at length, did not raise a word of dissent against the proofs that both custom and law required him to proceed up the western side of the channel.

B. The *Victory* was also in fault, under all rules and all customs, in not reversing her engines and stopping when she found that her signals were not assented to by the *Plymothian*.

When did she reverse? Candlish says that the reversing signal was given "a minute or so" after the second signal of the *Victory (Record Candlish, p. 51)*.

The master says that "half a minute" after the second signal he stopped his ship, and then gave three blasts of the whistle and rang his engines to go astern *(Record, Elcoate, p. 136)*.

The half minutes and minutes were very precious at that time, and the highest degree of vigilance and diligence was to be required from the *Victory*. She would have been able to overcome her headway if she had reversed in the first moment of danger. In proceeding on her course she delayed until too late, and when she finally attempted to avoid the collision by reversing she could not control her speed, and she cut fifteen inches into the heavy iron stringer plates of the *Plymothian (Record, Quigley, pp. 420, 421)*.

Second.

AN UNEQUAL DIVISION OR APPORTIONMENT OF DAMAGES IS NOT EXTRAORDINARY.

Article 67 of the Laws of Wisby provides that in cases of two or more vessels being in fault, the damages shall be apportioned *pro rata* according to the degree of fault.

Valin's Laws of Wisby, Art 67.

Such is the not uncommon rule upon the continent of Europe.

Such rule has also been freely applied in the United States in cases of admiralty torts.

The Explorer, 20 Fed. Rep., 135.
The Wanderer, 20 Fed. Rep., 140.
The Max Morris, 24 Fed. Rep., 860.

The case last cited was affirmed in the United States Circuit Court and in the United States Supreme Court.

The Max Morris, 28 Fed. Rep., 881.
The Max Morris, 137 U. S., 1.

And in a collision case three-fourths of the damages has been thrown upon one vessel, and one-fourth upon the other, solely because of the great disparity of fault.

The Mary Ida, 20 Fed. Rep., 741, 747.

The result of throwing a greater burden upon one vessel than upon another, in order to afford complete indemnity to owners of cargo or to other persons who have sustained damage though free from fault themselves, has been frequent.

The Washington and The Gregory, 9 Wall., 513, 516.
The Alabama and The Game Cock, 92 U. S., 695.
The Hartford and The Unit, 97 U. S., 323.
The Sterling and The Equator, 106 U. S., 647.

The more frequent practice undoubtedly follows the rule of equal division, which would require the *Victory* to pay one-half of the cargo's damage together with one-half of the *Plymothian's* damage.

Even after crediting the *Victory* with one-half of her own damages, the net amount which she would under the ordinary rule be required to pay would amount to over $63,000. The amount which she is called upon to pay is only a few thousand

dollars more, not a sufficient difference to call for the intervention of this Court.

The owners of the cargo being free from fault should receive full and immediate compensation.

First.

The cargo was entirely innocent, and it would be inequitable to defer satisfaction of her claims for two or three years more pending the determination of the proportions to be paid by each of the two guilty vessels. We submit that the Court, if inclined to consider further the equities between the vessels, should direct the immediate payment of the cargo's claims and the relief of the cargo from further litigation, according to the terms of the decree of the United States Court of Appeals. Any equities between the two vessels may be preserved for future adjustment by appropriate order.

Under a writ of *certiorari* the questions to be brought before the Court may properly be limited.

Second.

In case the Court directs that a writ of *certiorari* issue with the effect of deferring satisfaction of the cargo's claims, provision should be made for further bonds to secure the claims of the cargo.

The value of the *Victory* is insufficient of itself to pay the cargo's claims, and the value of the *Plymothian* and her freight is not sufficient to pay one-half the cargo's claims. In both cases the sureties given by the steamers are non-residents of the Eastern District of Virginia, being residents of New York. The sureties are bound only to the face amount of their stipulation, exclusive of interest at least up to the time of decree.

In order to avoid any question as to responsibility for accumulations of interest subsequent to the decree of the

United States Circuit Court of Appeals, the petitioners should be required to renew their bonds with new sureties, making specific provision for payment of such interest and costs.

Third.

BOTH PETITIONS SHOULD BE DENIED.

BUTLER, STILLMAN & HUBBARD,
Proctors for Cargo.

WILHELMUS MYNDERSE,
Advocate.

Nos. 66 and 67.

Brief of Mynderse for Canton Ins. Co.

Filed Oct. 25, 1897.

FILED
OCT 25 1897
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
Petitioner,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND OTHERS; JOHN McINTYRE, JR., AND OTHERS,
Petitioners,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND OTHERS.

Brief for Canton Insurance Co. (Lim.)

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellant.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

PORT OF PLYMOUTH STEAMSHIP COMPANY LIMITED,
Appellant,

vs

THE CANTON INSURANCE COMPANY LIMITED, AND OTHERS,
Respondents.

No. 66.

JOHN MACINTYRE JR., AND OTHERS,
Appellants,

vs

THE CANTON INSURANCE COMPANY LIMITED, AND OTHERS,
Respondents.

No. 67.

Brief for the Canton Insurance Company, Limited and others, owners of the cargo of the steamer Plymothian.

On the 12th day of November 1891 the steamers *Victory* and *Plymothian* came into collision in the Elizabeth River between Lambert's Point and Craney Island Light.

At the time of the collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea. She had left Galveston November 1st, with a

cargo of 3682 bales of cotton, bound to Liverpool, and had in the prosecution of that voyage come in through Hampton Roads and taken coals at Lambert's Point.

By the collision the port side of the *Plymothian* was cut below the water's edge near amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability.

The value of the *Victory* was appraised at $67,500, and her owners gave stipulation for that amount.

The value of the *Plymothian* was appraised at $33,350, and the value of her freight at $11,871, making a total of $45,221, which must be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. This has been fixed by consent at $5,000, leaving the limit of her owner's liability, therefore, $40,221.

In response to citations issuing in these proceedings, the damages arising out of the collision were presented and assessed. The damages sustained by the owners of the *Victory* were put forward in the proceedings instituted by the owners of the *Plymothian* and were assessed at £2,951.12s. 4d., or about $14,500. The damages sustained by the owners of the *Plymothian* were put forward in the proceedings instituted by the owners of the *Victory* and were assessed at £8,565.10s. 6d., or about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo were put forward in both proceedings and were assessed at £14,566, or about $72,000.

The *Victory* alleged that she was bound up the eastern side of the channel under reduced speed, with her master and a local pilot on the bridge; that she saw the *Plymothian* come out of Lambert's Point, cross to the western side of the channel and steady down the western side; that thereafter the *Plymothian* crossed to the eastern side of the channel, although the *Victory* gave signals that she was intending to hold the eastern side of the channel herself; that the *Victory* stopped and reversed her engines, but that nevertheless the collision occurred. She charged, also, that the *Plymothian's* whistle was defective.

The *Plymothian* alleged that when she came out from Lambert's Point she rounded into the channel as close as possible

to the eastern edge; that, after steadying down the eastern side of the channel, she saw the *Victory* coming up about mid-channel; that she signaled the *Victory* to pass port to port, but that the *Victory* starboarded and ran over to the eastern edge of the channel; that thereupon the *Plymothian* stopped and reversed her engines, but could not avoid collision. The master was on her bridge with a local pilot.

The collision occurred at Buoy No. 7, a buoy marking the eastern edge of eighteen-foot water.

The steamers came together at less than a right angle, there being about sixty to seventy degrees between the port side of the *Victory* and the starboard side of the *Plymothian*.

The District Court held that the collision was due solely to the fault of those navigating the *Victory;* but that it occurred without any fault or privity on the part of the owners of the *Victory (Opinion, pp. 447–458).* A final decree was accordingly entered October 30, 1894, by which it was decreed that the owners of the *Victory* should have the benefit of limitation of liability provided by the statutes of the United States, and that the amount of her appraised value, after deducting therefrom costs of $1,138.48 incident to establishing the right to limitation, be paid ratably to the owners of the *Plymothian* and to the owners of the *Plymothian's* cargo, in proportion to the amount of their adjudicated claims *(Decree, pp. 463, 464),* and that the owners of the *Plymothian* recover against the owners of the *Victory* and the owners of the cargo of the *Plymothian* their costs, aggregating $1,681.80 *(Decree, p. 465.)*

Appeal was taken from this decree by the owners of the *Victory (Record, pp. 477, 478).*

The owners of the cargo of the *Plymothian* likewise appealed from the decree, in so far as it held that the navigators of the *Plymothian* were free from fault contributing to the collision; and in so far as it held that the owners of the *Plymothian* should participate in the fund arising from the appraised value of the *Victory* upon equal footing with the cargo instead of subordinating their claim to the claims of the cargo *(Record, pp. 466-477).*

Upon the hearing of the appeals the United States Circuit Court of Appeals reversed the decree of the District Court

and held that the collision was due not only to the fault of those in charge of and navigating the *Victory*, but likewise to fault of those in charge of and navigating the *Plymothian*.

The court held that the owners of the steamers were entitled to limitation of their liability. They further held that as between the two steamers, the fault of the *Victory* was the more pronounced, and that her owners should therefore pay the cargo claims as far as the *Victory's* stipulated value would suffice, and that any amount remaining unsatisfied on account of the cargo claims should be paid by the owners of the *Plymothian*. A decree was entered accordingly (*Record, pp. 513–515*).

Under such decree the *Victory* bears about four sevenths of the total loss arising from the collision, and the *Plymothian* about three sevenths.

Upon petitions filed by the owners of the two steamers this court has issued writs of *certiorari*, under which the causes now come on for hearing.

The owners of cargo charge as faults against the *Victory*:

1st. That though meeting the *Plymothian* head to head, or nearly so, she did not port, but starboarded.

2nd. That she proceeded up the narrow channel of the Elizabeth River on the port or eastern side of the channel instead of upon the starboard or western side.

3rd. That she did not maintain a good lookout.

4th. That she did not sooner stop and reverse.

They charge as faults against the *Plymothian*:

1st. That she did not maintain a good lookout.

2nd. That she did not sooner blow an alarm signal and stop and reverse her engines.

3rd. That she persisted in porting.

They submit that there was no error in the rulings of the court in declining to give to the *Plymothian* the benefit of the British law in construing her bills of lading, and that there was no error in the method of apportioning of damages.

POINTS.

First.

THE VICTORY, BY HER FAULTS, CAUSED OR CONTRIBUTED TO THE COLLISION.

A. The *Victory* should have ported on seeing the *Plymothian*, instead of which she starboarded.

The channel of the Elizabeth River between Craney Island Light and Lambert's Point ranges for vessels of the class of the *Plymothian* and *Victory* from 300 to 400 yards in width *(Chart)*.

The *Victory* and *Plymothian* sighted each other when the *Plymothian* was at Lambert's Point, and when the *Victory* was at or below Craney Island Light, a distance of more than a mile.

The vessels were practically end on, or head and head, and each was under the duty of porting, so that they would pass each to the port side of the other.

The District Court held that the navigation of the *Victory* violated the provision of the International Regulations adopted by Congress in 1885.

The Circuit Court of Appeals, while holding to the opinion that the International Rules of 1885 were applicable and that the *Victory* was in fault for their violation, held that the navigation of the *Victory* was as well in violation of the provisions of Section 4233 of the Revised Statutes, and likewise of the customs regulating the navigation of the Elizabeth River.

Under a recent decision of this court all doubt is removed as to the rules governing the waters where the collision occurred.

The Delaware, 161 U. S. 459.

This decision relieves the *Victory* from the specific provision of Article 21 of the Act of March 3, 1885:

"ARTICLE 21. In narrow channels every steamship shall, "when it is safe and practicable, keep to that side of the fair-"way or mid-channel which lies on the starboard side of such "ship."

But she is left subject to the provisions of Section 4233 of the United States Revised Statutes as supplemented by the Pilot Rules of the Supervising Inspectors, and subject also to the special customs observed in the navigation of the Elizabeth River.

The pilot of the *Victory* locates his own vessel, when near Craney Island Light, at mid-channel *(Nelson, p. 336)*, and locates the *Plymothian*, when first seen, in mid-channel *(Nelson, pp. 331, 342)*.

"Q. You saw her go over from Lambert's Point pier?
"A. Yes, sir; and straightened down the middle of the channel" *(Nelson, p. 331)*.

* * * * * * *

"Q. You noticed when she came out and got about mid-channel she hung in mid-channel some time, and then she went to the eastern side?
"A. Yes, sir.
"Q. You don't desire to correct that in any way?
"A. No, sir.
"Q. And as for the period she was hanging in mid-channel it may have been a minute or two?
"A. Going down, sir.
"Q. Hanging down the mid-channel?
"A. Yes, sir.
"Q. And that was about one or two minutes?
"A. Yes, sir; I suppose so" *(Nelson, p. 342)*.

If both vessels were in mid-channel, one bound up and the other bound down, they were meeting end on, or head and head; and this position was not legally disturbed even if, in holding the mid-channel, one or the other was required by the conformation of the channel to turn from time to time a little to port or a little to starboard.

This position of the vessels being recognized by the pilot of the *Victory*, the man who was charged with the responsibility for her navigation, there is little need of referring to other witnesses in corroboration.

That the *Victory* was in mid-channel, however, is testified to by witnesses presented by each steamer *(Etheridge, p. 354; Henley, p. 366; Channel, p. 429; Harvey, p. 433; Mardon, p. 443)*.

That the *Plymothian* was in mid-channel is testified to by two of the *Victory's* principal witnesses *(Martin, p. 321; Nelson, pp. 331, 342)*.

The greater number of the *Victory's* witnesses place the *Plymothian* to the western side of mid-channel, while the *Plymothian*, by her witnesses, claims to have been on the eastern side of mid-channel. The average of the witnesses puts her in mid-channel, just where Nelson, the *Victory's* pilot, claims that he saw her *(Nelson, pp.* 331, 342*)*

Both vessels being in mid-channel, one bound up and the other bound down, each, whether under the statute or under the Pilot Rules, should have ported.

Instead of porting, the *Victory* starboarded *(Candlish, p.* 38; *Gilbert, p.* 65; *Elcoate, p.* 138*)*.

B. The *Victory* should have held the western side of mid-channel in coming up the river, instead of which she crossed to the eastern side.

(**a**) The Statute provides:

"RULE EIGHTEEN. If two vessels under steam are meeting "end on or nearly end on, so as to involve risk of collision, the "helms of both should be put to port, so that each may pass "on the port side of the other."

U. S. Revised Statutes, § 4233.

Both vessels being in mid-channel, one bound up channel and the other bound down, they were meeting end on, or nearly end on.

It matters not whether at the moment of sighting each other each bore a little on the bow of the other or not. By reason of the swing which the *Plymothian* was making, and by reason of irregularities in the course of the channel, such a bearing of one over the bow of the other might occur and still the vessels be, in a legal sense, end on or nearly end on. They were on courses one bound up channel and one down channel which, both being in mid-channel, would necessarily bring them within the operation of Rule 18.

(**b**) The Pilot Rules of the Supervising Inspectors supplement the Statute and remove any doubt that might arise from a too literal construction of Rule 18.

The material rules are as follows:

"RULE I. When steamers are approaching each other 'head "and head' or nearly so, it shall be the duty of each steamer "to pass to the right or port side of the other; and the pilot

" of either steamer may be first in determining to pursue this " course, and thereupon shall give as a signal of his intention " one short and distinct blast of his steam whistle, which the " pilot of the other steamer shall answer promptly by a similar " blast of his steam whistle, and thereupon such steamers shall " pass to the right, or port side, of each other. But if the " course of such steamers is so far on the starboard of each " other as not to be considered by pilots as meeting 'head and " head', or nearly so, the pilot so first deciding shall imme- " diately give two short and distinct blasts of his steam whistle, " which the pilot of the other steamer shall answer promptly " by two similar blasts of his steam whistle, and they shall " pass on the left, or on the starboard side of each other." *(Record, p. 344).*

" RULE II. When steamers are approaching each other in " an oblique direction (as shown in diagram of the 4th situa- " tion) they shall pass to the right of each other as if meeting " 'head and head' or nearly so, and the signals by whistles " shall be given and answered promptly as in that case speci- " fied." *(Record, p. 431).*

Now whether the *Plymothian* and *Victory* were exactly head and head or not, it is apparent that they were nearly head and head inasmuch as the one was bound up and the other was bound down a narrow channel. It must be admitted, at least, that they were approaching each other in "an oblique direction"; and, whatever their exact bearings, it is certain that under Rule II of the Pilot Rules each vessel was bound to port her helm, and pass to the right of the other. This Rule imposed upon the *Victory* exactly the same duties that rested upon her under Rule 18 of Section 4233 of the Revised Statutes, and as are suggested by Article 21 of the International Rules of 1885. By porting her helm to pass to the right she would have gone up on the starboard or western side of the channel, just where the International Rules indicate that a vessel should go.

(**c.**) So far as local custom is concerned, the custom is in exact accord with the terms of the International Regulations, the Federal Regulations of Section 4233, and the Pilot Rules. Whether the custom is older than the regulations and rules or whether it is a custom that has grown out of the regulations and rules does not appear; but in one way or the other it is firmly established.

Mardon, the master of the *Plymothian*, says :

" In navigating narrow waters, ships coming up go one " way, and going down they keep the other. The *Victory* " was on the east side when she should have been on the west " *(Mardon, p. 268)*.

" I say from the time she (the *Victory*) got under way in " Hampton Roads up to Lambert's Point she ought to have " kept on the west side of the channel.

" Q. You say it was her duty, from the time she hove " anchor in Hampton Roads to Lambert's Point, to keep on " the west side of the channel ? A. Yes, sir.

" Q. And it was the duty of the *Plymothian*— A. Or any " other steamer to keep down the eastern side " *(Mardon, p. 268)*.

" Q. The only navigation (of the *Plymothian*) as far as the " helm was concerned, was to keep on the east side of the river ? " A. Yes, sir " *(Mardon, p. 269)*.

" A. The east side was our proper course. I looked down " there more especially to see that it was clear " *(Mardon, p. 270)*.

" Q. Your idea of your duty was, even if you were on the " west side— A. If I was on the west side and there was " nothing in the way I should keep in the mid-channel, and as " soon as I saw anything coming up I should keep on the east " side.

" What consultation did you have with the pilot on that " day in reference to going down the east side ? A. Had none.

" Did you express those views to him ? A. No, sir.

" Did he communicate to you what the rule was in regard " to the western side ? A. He did not communicate to me, " because he knew I knew as well as he did.

" Q. How did you acquire that information ? A. By ten " or twelve years in this country, being here several times and " at Newport News.

" Q. Your idea is— A. By the United States law a ship " going down--

" Q. State the law ? A. Coming up, leave the red buoys " on the starboad bow ; going down, keep the black buoys on " the starboard bow " *(Mardon, p. 577)*.

" Q. If you were coming up the channel from Hampton " Roads, and saw a vessel coming out from Lambert's Point " pier dock, which side of the channel would you assume that " vessel would take after she got steady ? A. Down the east " side.

" Q. You would expect her to go down the east side ? A. " Yes, sir ; and act accordingly " *(Mardon, p. 280)*.

Henley, the pilot of the *Plymothian*, and experienced in the waters of the river and Hampton Roads, testifies :

" Q. Why do you take the eastern side ? A. That is the " proper side for a man to take ; if it is clear, to take that " side.

" Q. And coming up vessels take the western side ? A. " Yes, sir.

" Q. That is the regular course of navigation in all chan- " nels ? A. Yes, sir.

" Q. Each vessel takes the starboard side ? A. Yes, sir " *(Henley, p. 372).*

Adherence to this custom in the Elizabeth River is so strong that, as appears by one of the *Victory's* witnesses, vessels going out from Lambert's Point on a flood tide not infrequently let go their anchors to prevent being carried over to the western side, and at other times, instead of depending upon their own resources, take a tug to straighten them in the channel *(Tweddle, pp. 325, 326).*

The rule was well known to Elcoate, the master of the *Victory.* He had frequently been in Norfolk before.

" Q. Why did you not take the western side of the channel, " then ? A. We don't want to go to the western side of the " channel when the channel is free—we have got the whole " channel free.

" Q. You have been in Norfolk before ? A. Been running " here ever since these last five years.

" Q. You had in mind the width of the channel there ? A. " Yes, sir ; and I have oftener passed down the port side than " the starboard side.

" Q. Don't commence on your defence. When you do that " it sounds as if you were guilty. You said you knew you " were entering the channel of which you knew the width ? A. " Yes, sir.

" Q. And you knew that channel was a long course to Nor- " folk—several miles ? A. Yes, sir.

" Q. And you are acquainted, I suppose, with the rule of " the road that in rivers and narrow channels the vessel bound " down shall go to the right, and the vessel bound up shall " go the right ? A. Yes, sir, where practicable " *(Elcoate, pp. 151, 152).*

The pilot of the *Victory* has been examined at length, but he does not raise a word of dissent against the proofs that both custom and law required him to proceed up the western side of the channel.

The strongest proof, however, that the *Victory* was wrong in going up the eastern side is found in the excuses which she immediately began to offer for being on that side.

In her log she gives the earliest indications of her defense on this point.

In her proofs she enters upon an elaborate justification. She claims that first she met a tramp steamer, which gave the *Victory* a signal of two blasts, forcing her to pass starboard to starboard (*Elcoate p.* 131); that she then met three river steamers in close succession in the vicinity of Cranney Island, and that they each gave to the *Victory* a signal of two blasts, and forced her to pass starboard to starboard (*Elcoate, pp.* 131, 132); that by the time she was clear of these river steamers she met three schooners, one after the other, which compelled the *Victory* to hold the eastern side of the channel, and gave her no opportunity to cross to the western side (*Elcoate, pp.* 132, 133); that one of the schooners was still on the starboard bow of the *Victory* at the time of the collision (*Elcoate, p.* 150; *Nelson, pp.* 333, 338; *Gilbert, p.* 66).

How well do the proofs bear out this elaborate story told by the master of the *Victory?* Under cross-examination he is forced to admit that the tramp steamer was "*three miles*" ahead of the river steamers (*Elcoate, p.* 145).

If, as a fact, the tramp steamer did force the *Victory* to the eastern side of the channel, there was ample time for the *Victory* to regain her proper position on the western side; but it is at least doubtful whether the tramp steamer did anything of the kind.

The pilot of the *Victory* testifies:

"Q. Did you meet any foreign vessels on the way? A. Met
" one.
" Q. What was that? A. I don't recollect her name.
" Q. Laden? A. Yes, sir; going down; I don't know her
" name.
" Q. Give any signals? A. *I don't think she did;* I don't
" remember any" (*Nelson, p.* 330).

As to the river steamers, they were all small, light-draught vessels and were not bound by the limitations of the channel. It is extraordinary that a great steamer like the *Victory* should submit to be turned out of her proper position in the channel

by them, and, upon the proofs, it is apparent that nothing of the kind happened.

The navigators of two of the steamers have been examined, and have testified that they did not pass the *Victory* starboard to starboard, but that they passed her port to port *(Channel, p. 428; Harney, p. 433)*. It appears, therefore, that the river steamers had nothing to do with forcing the *Victory* to the eastern side of the channel.

It is significant that, although the pilot of the *Victory* states that he did starboard in order to pass the river steamers *(Nelson, p. 336)*, captain Elcoate testifies thus:

"Q. Did you have to change your helm for any of those "three river steamers? A. No, sir.

"And they did not have to alter theirs, apparently? A. "No, sir. * * *

"Q. But when you met those river steamers you were so far "on the eastern side of the channel? A. No, sir; we were on "the middle of the channel, as near as we could get. They "came down the western side.

"Q. You were so far to the east of them that you passed without changing your helm? A. Yes, sir" *(Elcoate, p. 152)*.

From the master's testimony it is clear that the river steamers did not force the *Victory* improperly. He had three miles, since passing the outward-bound tramp steamer, to choose his course in the channel, and he chose a course which did not involve any change of helm on his part when he met the river steamers.

Nor could the schooners have embarrassed the *Victory*. She should clearly have passed to the westward of them. As it was, she passed to the eastward of them. Her master claims that when he passed them the *Victory* was within forty yards of the eastern edge of the channel *(Elcoate, p. 133)*. It is apparent, however, that the schooners did not force him there. They were, indeed, on the eastern side of mid-channel, but they were so far on the eastern side that they furnish no excuse for the *Victory's* not going up the western side of the channel.

Bear in mind that the *Victory* was proceeding, according to her master's testimony, within forty yards of the eastern edge of the channel *(Elcoate, pp. 133, 149)*. He estimates that the schooners passed forty yards from him *(Elcoate, p. 133)*. On

this estimate the schooners must have been within eighty yards of the eastern edge of the channel. The channel is there three hundred yards wide, leaving two hundred and twenty yards to the westward of the schooners.

The pilot says that the *Victory* passed within fifty or sixty feet of the schooners *(Nelson, p. 338)*.

The first officer estimates that the schooners were from twenty to thirty yards away from the *Victory (Candlish, pp. 48, 49)*.

The third officer thought they were a hundred feet away *(Gilbert, p. 60)*.

The boatswain thought "all of them passed just a few yards" from the *Victory (Middleton, p. 103)*.

The second officer thought they were about ninety feet to the westward *(Stewart, p. 120)*.

The situation is this: that the *Victory*, according to her testimony, was within forty yards of the eastern edge of the channel, and the schooners were within from twenty to forty yards of the *Victory*, and, therefore, within sixty or eighty yards of the eastern edge of the channel, leaving nearly three-quarters of the channel clear to the westward. That clear portion of the channel was the *Victory's* proper water, and she should have occupied it.

The river steamers, as now appears from the proofs, passed the *Victory* port to port, and though they were not by their draft bound to the limits of the channel, they adhered to the rule and the custom that vessels going down should hold to the starboard side of the channel.

The schooners, being sailing vessels, were not in any wise within the contemplation of International Regulation 21; but, apparently in obedience to the local custom and in accord with the statutes, they, too, held to the starboard side of the channel.

The violation by the *Victory* of the regulation or rule or custom which called upon her to hold the starboard side of the channel imposes upon her the burden of showing that not only the collision did not result from such violation, but that it could not have resulted from such violation.

This burden is heavier than she can bear, and she must be condemned.

Mr. Marsden says:

"The re-enactment of the starboard side rule and its in-
"sertion in the regulations are of the utmost consequence to
"seamen. Any person in charge of a ship who navigates her
"on the wrong side of a narrow channel, besides being guilty
"of a misdemeanor, will almost inevitably subject himself and
"his owners to liability for any collision occurring when he is
"on his wrong side, unless it is proved that his being on the
"wrong side was unavoidable."

Marsden on Collisions, 2d Ed., p. 406.

It may be noted that the rule of the road is not to be treated as the sole criterion of negligence; but, before the vessel violating the rule can be excused from full responsibility for a collision, she must show that the other vessel might still, by due diligence, have avoided the collision.

C. The *Victory* should have maintained a proper lookout. No one was regularly assigned to the duty of lookout. Recognizing the obligation to carry a lookout, the master of the *Victory* assumes to fill the position. He says:

"A. I was on the bridge in command—on the lookout. Q.
"To whom did you report? A. To the pilot" *(Elcoate, p.* 134*)*.

"Q. And when you make oath in your libel that 'during
"'the voyage the master and a licensed Virginia pilot were in
"'command, and there was a lookout properly stationed,' you
"have reference to yourself? A. Yes, sir; I was the lookout.

"Q. So that in that sentence the word 'master' and the
"word 'lookout' refer to one and the same person? A. Yes,
"sir" *(Elcoate, pp.* 147, 148*)*.

The duties of the lookoat were discharged in just the manner that would naturally be expected from such an arrangement.

The master heard, or, rather, saw, the *Plymothian's* whistles. He saw "two puffs of steam about fifteen seconds apart
"—too far apart to be the same signal" *(Elcoate, p.* 154*)*. And he took it to be "two signals of one blast each" *(Elcoate, p.* 154*)*. And he understood by that that the *Plymothian* was directing her course to "starboard" *(Elcoate, p.* 154*)*.

Seeing these things, and knowing what they meant, he should, if he was a diligent lookout, have reported them to the

pilot. Certainly, if they had been so reported to the pilot, the pilot would not have persisted in holding the eastern side of the channel, or would, at any rate, have earlier stopped and reversed. But the master, apparently, reported nothing.

The pilot says :

"Q. You say you relied on the captain ; what did he tell "you? A. Didn't tell me anything.

"Q. Nothing was said to you about the *Plymothian's* "whistle, or the steam from the *Plymothian's* whistle ; no talk "at all on the subject? A. No, sir.

"Q. You didn't consider the *Plymothian's* whistles at all, "then? A. I didn't know she was blowing at all. * * *

"Q. You didn't know, and had no information, that the "*Plymothian* was blowing any whistles, or trying to blow any "whistles; that is right? A. Yes, sir.

"Q. And the captain didn't say anything to you about it, and "you didn't say anything to him about it? A. I asked him "to look out for him.

"Q. But he didn't say anything to you about her whistles? "A. I don't think he did.

"Q. Did you say anything to him about the *Plymothian's* "movements? A. No, sir" *(Nelson, pp. 342, 343).*

D. The *Victory* should have stopped and reversed her engines earlier than she did.

The claim of the *Victory* is that she blew a signal of two blasts to the *Plymothian*, and that the *Plymothian's* reply was "understood differently by different parties, the master of the "*Victory* taking it to be two whistles, and others not under-"standing whether it was one or two" *(Petition, Art. 2, p. 2);* and that thereupon the *Victory* repeated her signal of two blasts, and the *Plymothian*, instead of regarding it, ported her helm and swung herself across the channel, and crossed the bows of the *Victory (Petition, Art. 3, p. 2).*

The *Plymothian* produced many witnesses who testified positively that the *Plymothian* gave the first signal, and that it was a signal of one blast; but, in considering the charge against the *Victory*, that she should have earlier stopped and reversed, only the proofs coming from her own deck will be referred to, and they are sufficient to condemn her.

It was certainly the duty of the *Victory*, as soon as risk of collision arose, to stop and reverse. This is so either by the statutes or by the Pilot Rules.

The statute provides:

"RULE TWENTY-ONE. Every steam vessel, when approaching "another vessel, so as to invoke risk of collision, shall slacken "her speed, or, if necessary, stop and reverse."

U. S. Revised Statutes, § 4233.

This rule has received the careful consideration of Courts and of writers.

Marsden on Collisions, 2d Ed., 381–397.
The Khedive, Law Rep., 5 App. Cases, 876.
The Beryl, Law Rep., 9 Prob. Div., 137.
The Celo, Law Rep., 14 App. Cases, 670.
The Knight, 43 F. R., 895.
The North Star, 43 F. R., 807.
The Aurania, 29 F. R., 124.
The Adriatic, 107 U. S., 512, 515.
The Frisia, 28 F. R., 249.
The Memnon, 6 Aspinall, 317, 488.

The Pilot Rules provide:

"RULE III. If, when steamers are approaching each other, "the pilot of either vessel fails to understand the course or "intention of the other, whether from signals being given or an-"swered erroneously, or from other causes, the pilot so in doubt "shall immediately signify the same by giving several short "and rapid blasts of the steam whistle, and if the vessels shall "have approached within half a mile of each other, both shall "be immediately slowed to a speed barely sufficient for steer-"age-way until the proper signals are given, answered and "understood, or until the vessels shall have passed each "other" *(Record, p. 431).*

When the *Victory* blew a signal of two blasts, she was bound, if the *Plymothian's* answer was erroneous or it was not understood, to immediately give several short and rapid blasts of her whistle.

According to the petition filed by the *Victory* the answer from the *Plymothian* was not understood by the *Victory*. The *Victory* was bound then to signify that fact by giving her alarm blast.

The proofs do not agree with the petition, but they do not make the position of the *Victory* any better. While the petition says that the master of the *Victory* understood the *Plymothian's* reply to be two whistles, the master's testimony

shows that he understood those two whistles to be *two separate and distinct signals* from the *Plymothian*.

"Q. As I understand it, you saw two puffs of steam? A. "Yes, sir.

"Q. About fifteen seconds apart? A. Yes, sir.

"Q. That would be too far apart to be the same signal? "A. Wasn't the same signal.

"Q. If anything, it was two signals of one blast each? A. "Yes, sir; that is what I took it to be.

"Q. You took it to be two signals of one blast each? A. "Yes, sir.

"Q. And you know the rule of the road that a signal of "one blast means she is directing her course to starboard? "A. Yes, sir.

"Q. And after a time you saw she was actually directing "her course to starboard? A. Yes, sir" *(Elcoate, p. 154)*.

Upon the proofs, therefore, it is apparent that the *Victory* instantly got a cross-signal from the *Plymothian*—a cross-signal that involved risk of collision, and she was bound to instantly stop and reverse. Instead of that she proceeded on her course, and repeated her signal of two blasts.

In fact, the risk of collision was apparent to the navigators of the *Victory*, independent of any signals the *Plymothian* gave.

The first officer of the *Victory* testifies that he saw the *Plymothian* crossing the *Victory's* course under a port helm, and that he "then heard the captain say to the pilot, 'That ship has ported her helm'" *(Candlish, p. 56)*.

He further testifies:

"Q. You heard your captain say she was porting; when "did you hear him say that? A. Just before he blew the "second whistle" *(Candlish, p. 56)*.

If Candlish saw the *Plymothian* under her port helm before the *Victory's* second signal was blown, the pilot and master of the *Victory* must have seen the same thing; and instead of persisting in their signal of two blasts, they should have instantly stopped and reversed.

When did they reverse? Candlish says that the reversing signal was given "a minute or so" after the second signal of the *Victory (Candlish, p. 51)*. The master says that half a minute after the second signal he stopped his ship, and then

gave three blasts of the whistle, and then rang his engines to go astern (*Elcoate, p.* 136). The half minutes and minutes were very precious at that time, and the very highest degree of vigilance and diligence was to be required from the *Victory*. She would have been able to overcome her headway if she had reversed in the first moment of danger. In proceeding on her course she delayed until too late, and when she finally attempted to avoid the collision by reversing she could not control her speed, and she cut fifteen inches into the heavy iron stringer plates of the *Plymothian* (*Quigley, pp.* 420, 421).

Second.

THE PLYMOTHIAN, BY HER FAULTS, CAUSED OR CONTRIBUTED TO THE COLLISION.

A. The *Plymothian* should have maintained a proper lookout.

She had no one regularly stationed as lookout.

Neither her master nor her pilot heard more than one signal of two blasts from the *Victory* (*Petition, pp. 11, 13. Marden, pp. 265, 271. Healey pp. 363, 372*).

It is entirely clear that two such signals were blown. Aside from the proofs that come from the *Victory's* witnesses, several of the witnesses produced on behalf of the *Plymothian* testified to the fact that the *Victory* twice blew a signal of two blasts.

The master of the *Mary and Joe*, standing on the dock at Lambert's Point, says that the *Plymothian*

"blew one long whistle to the steamer *Victory* coming up; the "*Victory* answered with two; the *Plymothian* a little while "afterwards blew one more which was answered by two, and "the *Plymothian* then blew three whistles, and must have "went back on his engine" (*John I. Clarke, p. 388*).

The master of the *Pioneer*, lying near buoy 9, testifies:

"Q. And you saw and heard the *Plymothian* blow one "whistle and heard the *Victory* answer with two? A. Yes,

" sir, and shortly after that the *Plymothian* blew one again, a " long whistle, that was answered with two from the *Victory*" *(Joseph M. Clarke, p. 401).*

The master of the *Lumberman*, coming out of Tanner's Creek, says :

" The *Plymothian* sounded her one long blast of the whistle " and waited, I suppose, an interval of about, as near as I can " remember, two or three minutes, which the *Victory* answered " with two blasts of a steam whistle, and the *Plymothian* " waited again about the same length of time, and blew her " long blast of the whistle, and the *Victory* answered with " two, the same " *(Wynne, p. 404).*

The master of the *Commodore*, lying near Lambert's Point, and further from the *Victory* than was the *Plymothian*, testifies :

" I heard him [the *Plymothian*] blow just as soon as he " hauled around the buoy and straightened up. He blew one " whistle. Of course, that was to the *Victory*. * * *

" Q. Did you see or hear anything from the *Victory?* A. " I saw the steam of two whistles, but never heard the whistles.

" Q. You saw the puffs of steam from the whistle but " never heard the sound? A. Never heard the sound at all.

" Q. What did the *Plymothian* do? A. Then a little while " after that, I suppose two or three seconds, he blew the one " whistle again. * * *

" Q. What did the *Victory* do then? A. The *Victory* blew " two; I heard those " *(Goodwin, pp. 373, 374).*

The learned District Judge says :

" On the question of lookouts I have been always exact- " ing, and I think both steamers were at fault in not having " had each a special lookout on duty " *(Opinion, p. 455).*

Not one of these witnesses, all of whom have been produced and examined on the part of the *Plymothian*, was as advantageously situated for noting the signals of the *Victory* as would have been a regularly appointed lookout stationed on the forecastle or on the bridge of the *Plymothian*.

That the *Plymothian* was in fault in not having a lookout cannot be disputed; that that fault was one contributing to the collision and rendering her liable to the owners of the cargo is equally clear.

She was proceeding down narrow waters alive with vessels, and her master and pilot on the bridge were engaged in the pleasing, but perhaps too engrossing, courtesies of extending salutes and bidding farewell to the friendly craft about them *(Mardon, p. 264; Henley, p. 364)*.

It was especially important that some one should be stationed forward burdened with no duties of courtesy, and relieved from all social obligations, and whose sole duty should be to watch for and report the movements and signals of vessels coming up the river.

It has been truly and graphically said:

"The lookout's duty is distinct and different from that of "the navigator. He is in a different position on deck, his hand "and eye are differently occupied; his work and duty is "different as that of one man can well be from the work and "duty of another. The lookout of a ship is its eyes and ears; "without him she is blind and deaf. There is close and re- "sponsible relation between him and the pilot. His eye con- "stantly and searchingly scans the face of the water before "and on either bow of the ship; his voice is prompt to warn "off every object that presents itself to the vision."

The Manhasset, 34 Fed. Rep. 408, 411.

It is impossible for the *Plymothian* to say that if there had been a lookout stationed for the special purpose of watching for vessels and their signals he would not have heard all the signals that the *Victory* gave. It is equally impossible to say that if the pilot of the *Plymothian* had heard the signals which the *Victory* gave, or if it had been reported to him by a lookout, he would not have earlier recognized his danger. Recognizing his danger he would have assured safety either by yielding to the demands of the *Victory*, unreasonable as they were, or by slowing, stopping and reversing his engines, and keeping out of collision.

Under the provisions of Pilot Rule III, the receipt of a cross signal imposed upon the *Plymothian* the instant duty of blowing alarm signals and the further duty, as the vessels were then within half a mile of each other, of slowing her engines.

But the cross signal, freighted with such import, was not heard by the *Plymothian*, and it was not heard because she had no lookout.

In consequence, she did not blow alarm signals; she did not slow her engines.

It was error in the District Judge to hold that the absence of a lookout did not contribute to the collision *(Opinion, p. 455)*.

The Circuit Court of Appeals in holding the *Plymothian* in fault, do not especially assign fault in the matter of her failure to maintain a lookout, and in this respect there is error.

We submit that, as matter of fact, it is proved that the absence of the lookout and the consequent failure of the *Plymothian* to hear the cross-signal of the *Victory*, did contribute to the collision.

Aside from the question of fact, however, the rule of law in respect to the omission of a specific duty is not fairly recognized by the learned District Judge. He says that because it does not appear that the absence of the lookout contributed to the collision he will not hold the *Plymothian* liable.

The rule, however, is that when a clear duty is omitted the burden rests upon the negligent vessel of establishing affirmatively that the omission could not have contributed to the collision.

> " In such a case the burden rests upon the ship of showing " not merely that her fault might not have been one of the " causes, or that it probably was not, but that it could not have " been."
>
> *The Pennsylvania, 19 Wallace 125.*
> *The City of Washington, 92 U. S. 31, 36.*

No burden rests in this case upon the cargo to establish that the omission of the *Plymothian* did in fact contribute to the collision.

The learned District Judge bases his conclusion upon the fact that the *Victory* blew her first cross signal when half way between Buoy No. 7 and Craney Island Light, or

> " more than a thousand yards from the *Plymothian*, before any " stress of circumstances arose to require of her a violation of " the rule of navigation which she was faithfully adhering to " *(Opinion, p. 455)*.

The vessels were not in fact a thousands yards apart at that time for the *Plymothian* had already proceeded some distance down the river; but even if they had been a thousand yards apart they were when their respective rates of speed are con-

sidered, distant from each other less than three minutes of time. Under cross signals, if such had been recognized, it was the duty of the *Plymothian* to act instantly for safety; a duty which was recognized by her when at a later stage she did hear a cross signal from the *Victory*.

U. S. Revised Statutes, Section 4323, Rule 21.
Pilot Rule III.
The Baltimore, 56 Fed. Rep. 125.
The Knight, 43 Fed. Rep. 895.
The Aurania, 29 Fed. Rep. 127.
The Frisia, 28 Fed. Rep. 249.
Marsden on Collisions, 2nd Ed. 381–397.

B. The *Plymothian* should have blown danger singals and should have stopped and reversed her engines earlier than she did.

If the *Plymothian* had heard the first signal of two blasts which the *Victory* blew she would have stopped and reversed then, and if she had stopped and reversed then she would have avoided the collision.

That cross signal, which she should have heard, and which if she had carried a lookout she presumably would have heard, created one of the "special circumstances" contemplated by Rule 24 of § 4233.

The duty rested upon her even before the last cross signal came and as soon as her signals were disregarded by the *Victory* to promptly blow danger signals and take measures by stopping and reversing her engines to avoid collision.

Pilot Rule III. of the Supervising Inspectors provides as follows:

"If, when steamers are approaching each other, the pilot "of either vessel fails to understand the course or intention of "the other, whether from signals being given or answered er- "roneously, or from other causes, the pilot so in doubt shall "immediately signify the same by giving several short and "rapid blasts of the steam whistle, and if the vessels shall "have approached within half a mile of each other, both shall "be immediately slowed to a speed barely sufficient for steer- "age way until the proper signals are given, answered and "understood, or until the vessels shall have passed each other" *(Record, p. 431).*

The *Plymothian* claims in her petition that she three

times blew a signal of one blast to the *Victory*, and that she received no reply from the *Victory* until after the third blast. Her petition alleges :

" Almost immediately upon clearing said buoy No. 9 a " steamer was observed in the Elizabeth River coming up and " almost abreast of Craney Island Light house at a rapid " speed, which afterwards proved to be the *Victory ;* that im- " mediately one blast of the *Plymothian's* steam whistle was " sounded loud, clear, and distinct to the said steamer ; that " no response was given to said signal, which was twice re- " peated at short intervals of time, when finally an answer was " sounded by the *Victory*, and then the cross signal of two " whistles was heard." *(Petition, pp. 11, 12).*

Few of the witnesses examined on behalf of the *Plymothian* heard more than two whistles from her ; but the three signals alleged in the petition are supported in a measure by the master, the pilot, and the first officer.

Mardon, the master, states that when one hundred yards below Buoy No. 9 he gave one blast, to which there was no reply, and that " from a minute to a minute and a half " later he gave a second signal, to which there was no reply ; and that " about a minute to a minute and a half " still later he gave a third signal, to which he received a cross signal *(Mardon, p. 265).*

The pilot, Henley, testifies that the *Plymothian* gave two signals to which there was no reply, and that then the master of the *Plymothian* said to him " Pilot, what is that fellow " doing ? " And that then the *Plymothian* blew one more signal and received in reply the cross signal, and that thereupon the danger signals were blown and the engines reversed. *(Henley, p. 361).*

The particular circumstances which led to the master's remark " Pilot, what is that fellow doing ? " appears later, when Henley testifies, in speaking of the *Victory :*

" He starboarded a little for me, but didn't come up straight " for me, and as I saw him altering his course I blew him a " signal and he blew two whistles, and I blew the danger signal " and reversed the ship." *(Henley, p. 363).*

Still again the pilot of the *Plymothian* testified that he observed that the *Victory* was starboarding prior to the time that he blew his last signal of one blast to her.

" Q. Pilot, as I understand it you blew three single blasts " as signals ? A. Yes sir.

" Q. The first to indicate that you were going down the " eastern side of the channel ? A. Yes sir.

" Q. And the second one was a repetition of that ? A. " Yes sir.

" Q. It was after blowing that second one that you saw the " *Victory* port a little so as to show her port side ? A. A little " more, yes sir.

" Q. And that porting was an incident to the course of the " channel ; if he followed the channel he would naturally port " a little at the point where she was ? A. Yes sir.

" Q. At the same time it tended to accord with the move- " ment which you had started ? A. Yes sir.

" Q. But after a little you saw she had steadied and was " starboarding ? A. Yes sir.

" Q. And you blew the third signal ? A. Yes sir and she " answered with a signal of two.

" Q. And you blew the danger signal and she blew the " danger signal shortly after ? A. Yes sir.

" Q. That is a history of the signals ? A. Yes sir." *(Healey, pp. 371, 372).*

The pilot, who was specially charged with the navigation of the vessel *(Mardon, p. 361)* thus observed that the *Victory* was starboarding after he had twice blown to her a signal requesting her to port.

This was explicit notice to him that either the *Victory* had not heard, or that she was disregarding his signal of one blast.

This was another " special circumstance " which called into operation Rule 24.

What was he then bound to do ?

Under the provisions of Pilot Rule III he was bound to blow the short rapid blasts of a danger signal and to slow his engines.

Under Rule 21 of Section 4233 he was bound to stop and reverse.

What *did* he do ?

He, on his part, showed a bit of stubbornness and, instead of obeying the statutes and the rules, he repeated his signal of one blast, blowing it for the third time, and did not, until a cross signal was heard, attempt to perform the duties put upon him by law.

Except for this stubbornness, the collision would have been avoided.

The *Plymothian* cannot meet the difficulty by asserting that she reversed "four minutes" before the collision.

It is, indeed, a fact that her engine-room log contains the entries "Full speed astern 4:10 P. M. Ship struck 4:14 P. M." *(Exhibit A, p. 282).* The entries are supported by the testimony of the engineers *(Scullard, p. 169; Cronquist, pp. 175, 176).* The deck officers adopted the same estimate *(Mardon, p. 265).*

Circumstances make it certain, however, that the *Plymothian* did not reverse for four minutes, and any attempt on her part to establish such a period by specific measurement of time tends to throw discredit upon her whole story. If we accept the statement as an unmeasured informal erroneous estimate it is as far as we can go.

Mardon estimates that the distance separating the vessels when he observed the *Victory* starboarding was "from 200 to 300 yards" and that "after that" the *Plymothian's* danger signals were blown and her engines reversed. *(Mardon, p. 265).*

The pilot, Henley, testifies that his vessel ran only "about 300 feet" from the time she blew her danger signals, at which time she reversed, up to the time of the collision. *(Henley, p. 361).*

This was scarcely more than one length of the *Plymothian*, and it was a matter of seconds, not of minutes, for her to cover such distance.

C. The *Plymothian* was in fault for persisting in porting after she saw that the *Victory* was starboarding.

It is true that porting was the right measure for both vessels to take originally. But when, through misunderstanding or through fault, the *Victory* starboarded and was seen to be starboarding, the *Plymothian* had no right to persist in porting. The *Plymothian* not only ported and persisted in porting, but she hard aported after seeing that the *Victory* was starboarding.

Her master testifies:

"We had been steering down the east side of the channel "until we saw a collision was likely, and then we put the "helm *hard aport* when we saw him come up on his starboard "helm.

"Q. How near was the *Victory* to you at that time? A. "It is a little bit hard to judge of distance; but I should say "from 200 to 300 yards.

"Q. Just continue to describe what occurred *after* that? "A. We blew the whistles and put the engines full speed "astern." *(Mardon, p. 265).*

The *Plymothian* cannot escape responsibility by pleading the gross faults of the *Victory*.

The *Beryl* collided with the *Abeona*. Lord BRETT in considering the application of the statutory rules to the *Abeona*, said:

"The *Abeona* did everything that was wrong; and then the "question arises, Did the *Beryl* break any of the rules? "* * * The *Abeona* no doubt ought to have acted, but she "did not act. She was obstinately going on. What ought the "officer on board the *Beryl* to have done then? He had a "right to think she would not have continued her obstinacy. "* * * With great reluctance, the conduct of the *Abeona* "having been as bad as it could be, the officer of the *Beryl* "having been put into a difficult position by the obstinate "folly and wickedness of the Abeona, all that can be said is, "as was said in the Khedive, that he did not do that which "the Act of Parliament declares and enacts he must do, (for "although he did it, he did not do it at the right time), and "for this pardonable, excusable and slight fault, I feel bound "to say his owners are liable for this collision equally with "the owners of the *Abeona*."

The Beryl, Law Reports 9 Prob. Div. pp. 137, 142, 144.

The case of the *Plymothian* is by no means as clean as was that of the *Beryl*. She was proceeding through narrow and frequented waters, without a regularly stationed lookout. Her navigators failed to note at all the cross signal of the *Victory*; and though they saw that the *Victory* was on the eastern side of the channel, and though they heard no response to their signals, and though they saw that the *Victory* was starboarding, they nevertheless persisted in going down the eastern side, and in attempting it, forced their way against the *Victory* until they did hear the second cross signal.

Third.

THE PLYMOTHIAN IS NOT RELIEVED FROM RESPONSIBILITY BY THE TERMS OF HER BILLS OF LADING.

By stipulation made in the cause, the fact is admitted that the cargo of the *Plymothian* consisted of 3682 bales of cotton shipped at Galveston, Texas, to be delivered at Liverpool. It is further admitted that 1671 bales thereof were shipped on the *Plymothian* under bills of lading of the Texas-European Steamship Line, and that the remaining 2011 bales were shipped from interior points on through bills of lading given by the inland carrier to the shipper, covering transportation via Galveston to European destination.

The cotton, under these last mentioned bills of lading, upon reaching Galveston, was delivered by the inland carrier to the *Plymothian*, whose master, upon receiving the bales of cotton on board issued therefor other bills of lading or receipts to the inland carrier *(Stipulation, pp. 483, 484)*.

Specimen copies of the three forms of bills of lading follow the stipulation.

A. The bills of lading issued by the Texas-European Steamship Line covering the 1671 bales shipped in Galveston and directly upon the *Plymothian* contained the following provisions:

"The vessel shall not be liable for loss or damage occa-
"sioned by causes beyond her control, by the perils of the sea
"* * * by collisions, stranding or other accidents of
"navigation of whatsoever kind (even when occasioned by the
"negligence, default or error of judgment of the pilot, master,
"mariners or other servants of the ship owner not resulting,
"however, in any case, from want of due diligence by the
"owners of the vessel or by any of them, or by the ship's
"husband or manager" *(p. 487)*.

And

"This contract shall be governed by the law of the flag of the
"vessel *carrying* the goods, except that general average shall be
"adjusted according to York-Antwerp rules. In accepting this
"bill of lading, the shipper, owner and consignee of the goods
"and the holder of the bill of lading, agree to be bound

" by all its stipulations, exceptions and conditions, " whether written or printed, as fully as if they were all signed " by such shipper, owner, consignee, or holder, any custom of " the port notwithstanding." *(p. 488).*

The Texas-European Line ran from Galveston to Liverpool, Havre and Bremen, and was of no defined nationality. J. Moller & Company of Galveston signed the bills of lading and described themselves as " agents or charterers of the " steamer *Plymothian* " and, in receipting for the cotton they stipulated that it should be

" transported by said steamer *or any other steamers* of the " Texas-European Steamship Line from the Port of Gal- " veston." *(p. 485).*

The bills of lading further provided :

" The vessel has liberty in the event of her being full of " cargo or putting back to any port or otherwise being pre- " vented from any cause from proceeding on the ordinary " course of her voyage, to transship the goods *by any other* " *steamer* or steamers."

B. The form of bills of lading issued by the inland carriers is shown by the specimen, pages 494–498.

It was issued by the Gulf, Colorado & Santa Fe Railway Company at Ardmore, Indian Territory, covering fifty bales of cotton through to Liverpool, England. It was No. 48, Contract No. 287.

It contained this clause :

" The property covered by this bill of lading is subject to " all the conditions expressed in the customary forms of bills " of lading in use by said steamship or Steamship Company at " time of shipment." *(p. 494).*

No steamship or Steamship Company, had, however, been referred to earlier. The first seven numbered clauses of the bill of lading related to the exemptions and conditions of the Railway Company. The eighth clause was as follows :

" (8). And it is further agreed that the property shall be " transported from the port of Galveston, Tex., to the port of " Liverpool, Eng., by the steamer *Sandfield* with liberty to ship " by *any other steamship or steamship company*, subject to the " following terms and conditions, viz. :

"To be delivered from the ship's deck, where the ship's re-
" sponsibility shall cease, the acts of God, the Queen's
" enemies, pirates, robbers, thieves, vermin, jettison, barratry
" of masters or mariners, misfeasance, error in judgment, neg-
" ligence or default of pilot, master, mariners, engineers, of
" other persons in the service of the ship (whether in navi-
" gating the ship or otherwise), restraints, of princes, rulers or
" people, * * * or any other accidents of seas, land,
" rivers and steam navigation of whatever nature or kind
" soever excepted, however caused or originating (whether any
" one or more of such exceptions arise, occur, or in any way
" occasioned from or by the negligence, default or error in
" judgment of the masters, mariners, engineers, or others of
" the crew, or of any of the servants or employes of the ship
" owners, or otherwise however); and with liberty during the
" voyage to call at any port or ports, to receive fuel, to load
" or discharge cargo, or for any other purpose whatever; to
" sail with or without pilots, to tow and assist vessels in all
" situations; and in the event of said steamer being full of
" cargo, or putting back to any port, or being otherwise pre-
" vented from proceeding in the ordinary course of her voy-
" age, to tranship the goods *by any other steamer (pp. 495, 496).*

Near the foot of the bill of lading appears the following:

" Attention of shippers is called to the Act of Congress of
" 1851: 'Any person of persons shipping oil of vitriol, un-
" 'slacked lime &c &c * * * * shall forfeit to the
" 'United States one thousand dollars.'" *(p. 497).*

Upon arrival of the cotton in Galveston it was delivered by the inland carrier not to the *Southfield*, but to the *Plymothian*; and the master of the *Plymothian* issued a receipt, referring in terms and specifically to the bill of lading issued by the Railroad Company at Ardmore. That receipt contained, among other conditions, this provision:

" The carrier shall not be liable for loss or damage occa-
" sioned by causes beyond his control; by the perils of the
" sea, rivers, canals and navigation; by fire from any cause or
" wheresoever occurring; by barratry of the master or crew;
" by enemies, pirates or robbers; by arrest and restraint of
" princes, rulers or people; riots, strikes or stoppage of labor;
" by explosion, bursting of boilers, breakage of shafts, or any
" latent defect in hull, machinery or appurtenances; by col-
" lisions, stranding or other accidents of navigation of what-
" soever kind (even when occasioned by the negligence, de-

" fault or error in judgment of the ship-owner, not resulting, " however, in any case, from want of due diligence by the " owners of the ship or any of them, or by the ship's husband " or manager), *(pp. 489, 490)*.

It also contained the provision :

" This contract shall be governed by the law of the flag of " the vessel *carrying* the goods, except that general average " shall be adjusted according to York-Antwerp Rules, 1890." *(p. 492)*.

C. It will be noted that the bills of lading contained provisions obnoxious to the public policy of the United States.

It has been said by this court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs Lockwood 17 Wallace, (U. S) 357, 378.

The rule has been extended from the strict applications resting upon the carrier by land to cover those of a carrier by sea.

Liv. & G. W. Steam Company vs Phenix Insurance Company (The Montana) 129 U. S. 379.

The bills of lading were issued nearly two years before the passage of the Harter Act.

27 U. S. Statutes at Large, p. 445, Ch. 105.

The carrier sought to avoid the rules of our existing national public policy by a provision that the contract shall be construed by the "law of the flag of the vessel carrying the goods." That, and kindred provisions have been over-ruled in our courts as invalid as embodying attempts at evasion by the carrier.

The Energia, 56 Fed. Rep. 124.
Lewisohn vs National S. S. Co. 56 Fed. Rep. 602.
The Iowa, 50 Fed. Rep. 561.
The Brantford City, 29 Fed. Rep. 373.
The Guildhall, 58 Fed. Rep. 796.
The Glenmavis, 69 Fed. Rep. 472.

In an English case where the question of applying foreign law was considered, Mr. Justice FRY said :

" It appears to me, however plain on general principle, " that the court will not enforce a contract against the public " policy of the country wherever it may be made; it seems to " me almost absurd to suppose that the courts of this country " should enforce a contract which they consider to be against " public policy, simply because it happens to have been made " somewhere else."

Rousillon vs Rousillon, L. R. 14 Chancery Div 351, 369.

And in another English case the court said :

" The question to be considered is not merely whether the " contract sought to be enforced is valid according to the laws " of the country in which it was entered into, but whether it is " consistent with the laws and the policy of the country in which " it is sought to be enforced."

Hope vs Hope, 8 de Gex MacN. & G. 731, 743.

The true test applied by this court to determine the validity of any provision in a bill of lading, is the measure of what is " just and reasonable in the eye of the law."

Railroad Company vs Lockwood, 17 Wallace, 357, 380, 382.

We submit that it is not "just and reasonable" to make a provision for the application of the "law of the flag of the vessel " *carrying* the goods."

Even in respect of the 1671 bales of cotton shipped at Galveston and receipted for by the Texas European Steamship Line for proposed transportation on the *Plymothian*, there was no declared specific national law provided for.

While the *Plymothian* was named, her nationality was not given, and the bill of lading in terms reserved to the carrier the right to transport the cotton " by said steamer or *any other* " *steamers* of the Texas-European Steamship Line."

The carriers were mere " charterers " of steamers, and they carried to Liverpool, to Havre, to Bremen. Presumably they carried by vessels of all nationalities.

At the convenience of the carrier the cotton, although the *Plymothian* was named, might have been shipped on any other steamer, or have been transshipped upon another steamer after original shipment on the *Plymothian (p. 485).*

However just and reasonable it might be to stipulate in respect of cotton bound to a foreign port that the contract should be construed by the law of the port of destination, it is not "just and reasonable in the eye of the law" to make a contract full of stipulations which are declared void by the public policy of the United States, and seek to validate them by invoking as enforcible law foreign principles indicated only by the flag of the accidental carrying vessel in whose selection the shipper has no controlling choice, and whose nationality is not discoverable.

In respect of the 2011 bales shipped at inland points by rail it will scarcely be contended that the clauses exempting the ocean carrier from the consequences of his servants' negligence are valid. The bills of lading issued to the shippers contain no provision subjecting the contract either to the law of any specified foreign country or to the law of the flag of the vessel carrying the goods.

There was indeed this provision:

"The property covered by this bill of lading is subject to "all the conditions expressed in the customary forms of bills "of lading in use by said steamships or Steamship Company "at time of shipment." *(p. 494).*

The steamer *Smalfield* was named as the steamer to perform the ocean carriage "with liberty to ship *by any other* "*steamship* or Steamship Company." *(p. 496)*

There was no intimation in the bill of lading that any foreign law was contemplated. On the other hand, the attention of shippers was called specifically to the Act of Congress of 1851, creating an implication at least that the laws of the United States would be applicable.

The circumstances that the Railroad Company, upon delivering the cotton to the ocean carrier *(Stipulation, pp. 483, 484)*, accepted a receipt from the master of the *Plymothian*, subjecting the contract to the law of the flag, cannot affect the shipper or his assigns. The master knew exactly under what limitations of authority the railroad carrier acted, for in his receipt he referred in terms and specifically to the inland bill of lading *(p. 498)*.

The greater portion of the cotton, to wit, 2011 bales, were shipped under inland bills of lading and are free from any question as to the application of the law of the flag.

Inasmuch as the *Plymothian* was only partly in fault for the collision, and carries at most only half the damage, it would afford her no relief if, in respect to the 1,671 bales shipped at Galveston, the Court should find the stipulation for the application of the law of the flag to be "just and reasonable," and therefore valid

Fourth.

THE CIRCUIT COURT OF APPEALS HAD THE POWER IN THEIR DISCRETION TO SO APPORTION THE DAMAGES AS TO THROW A GREATER PROPORTION THEREOF ON THE VICTORY THAN ON THE PLYMOTHIAN, AND THERE IS NO ERROR IN THEIR DECREE IN THAT RESPECT.

The principal amount of the cargo damages was about $72,000; of the damages of the *Plymothian* about $42,000; of the damages of the *Victory* about $14,500.

At the time the decree of the Circuit Court of Appeals was entered, the damages of the cargo, including interest, amounted to about $87,000; those of the *Plymothian* about $51,000; and those of the *Victory* about $17,500; or a total of $155,500. Of these total damages under an equal apportionment against the wrongdoers, about $78,000 would fall upon the *Victory*, of which she would bear $17,500 in the way of her own damages, leaving her to pay the further sum of $61,000. She is, therefore, under the terms of the decree of the Circuit Court of Appeals, required to pay $67,560, which is about $7,000 more than her half share.

The *Plymothian*, instead of paying $78,000, is required to bear her own damages of $51,000, and to pay to the cargo about $20,000, the aggregate charge against her being about $7,000 less than the one-half which she would bear under an equal apportionment.

Roughly, the *Victory* carries about fifty-five per cent. of the damages, and the *Plymothian* about forty-five per cent., a distinction which fairly marks their relative degrees of fault.

The Circuit Court of Appeals in their opinion say:

"The rule unquestionably is that when both vessels are in "fault, both must contribute to make good the damages (*The "Washington and the Gregory*, 9 Wall., 513; *The Connecticut*, "103 U. S., 710; *The Potomac*, 105 U. S., 630). And the "general rule, almost universal, is to divide the loss equally "among the guilty parties, with this qualification: that if one "party is exhausted before the person injured is fully indemni-"fied, the deficiency must be made up by the other party (*The "North Star*, 106 U. S., 17; *The Max Morris*, 137 U. S., 1; "*The Washington and the Gregory*, 9 Wall., *supra*; *The Ala-"bama and the Game Cock*, 92 U. S., 695.) But this rule "cannot be said to be inflexible. In *The Max Morris*, 137 "U. S., 1, the question was suggested before the Supreme "Court but it was not necessary to pass upon it. The Court "says: 'Whether in a case like this (mutual fault) the decree "'should be for exactly one-half of the damages sustained, or "'might, in the discretion of the Court, be for a greater or less "'proportion of such damages, is a question not presented for "'our determination on this record, and we express no opin-"'ion on it.'

"The application of an equal division of damages is said to "be the *rusticum jus*. Chancellor KENT applies to it that "term. *3 Kent Comm., section 231; Marsden on Collision, 2nd "Ed., page 133.* That is to say, it is an application of that "sense of fair dealing and of justice imbedded in our nature, "the conclusions of common sense, of a mind '*abnormis* "'*sapiens.*' If the spirit of the rule be adopted and the liabil-"ity of each vessel be measured by its degree of fault, exact "justice will be done by applying the stipulated value of the "*Victory* to the loss sustained by the cargo, and by requiring "the *Plymothian* to make up any deficiency, so that the cargo "owners obtain complete indemnity." *(p. 504).*

The Circuit Court of Appeals was properly impressed by the fact that the cargo had no share in the faults committed by the steamers, and that her owners were entitled to complete indemnity, *restitutio ad integrum. (Opinion, p. 504).*

While the more frequent practice in this country undoubtedly follows the rule of equal division, the result is often reached that a greater burden is thrown upon one vessel than upon another in order to afford complete indemnity to owners of cargo, or to other persons who have sustained damage, though free from fault themselves. Such instances have arisen when one of two faulty vessels was of insufficient value to pay

her full one-half. Then the other guilty vessel has been compelled to make up the deficiency.

The Washington and the Gregory, 9 Wall., 513, 516.
The Alabama and the Game Cock, 926, 695.
The Hartford and the Unit, 97 U. S. 323.
The Sterling and the Equator, 106 U. S. 647.

Aside from these instances where the greater loss has been thrown upon one vessel through accidental circumstances, it has not been unprecedented to make a decree imposing a heavier burden upon one because of her graver fault.

The Mary Ida 20 Fed. Rep. 741, 747.

And the rule had been freely applied in causes of admiralty torts other than collisions.

The Explorer 20 Fed. Rep. 135.
The Wanderer 20 Fed. Rep. 140.
The Max Morris 24 Fed. Rep. 860.

The case last cited was affirmed in the United States Circuit Court and in this Court.

The Max Morris 28 Fed. Rep. 881.
The Max Morris 137 U. S. 1.

The rule of equal apportionment of damages between two vessels whose respective faults have contributed to a collision was first adopted in this court in 1854 in the case of the schooner *Catharine*. Mr. Justice NELSON delivered the opinion of the court, and said:

"It becomes necessary to settle the rule of damages in a "case where both vessels are in fault.

"The question, we believe, has never until now come dis- "tinctly before this Court for decision. The rule that pre- "vails in the District Court and Circuit Courts we understand "has been to divide the loss.

"This seems now to be a well-settled rule in the English "Admiralty (citing several cases).

"Under the circumstances *usually attending these disas-* "*ters* we think the rule dividing the loss most just and equi- "table, and as best tending to induce care and vigilance on both "sides in the navigation."

The Schooner Catharine, 17 How., 173–177

That was the precedent in this country and it has been followed without discussion.

The precedent relies exclusively upon English cases. While the cases cited do show the well-settled rule in the English Admiralty to make an equal apportionment of damages such rule does not conform with the rule of other maritime nations.

Moreover it appears to have been originally adopted in England through error, or rather without correct knowledge of the general maritime law.

The statute of Great Britain provides that

> " In any cause or proceeding for damages arising out of a " collision between two ships, if both ships shall be found to " have been in fault, the rules in force in the court of admiralty, " so far as they have been at variance with the rules in force " in the courts of common law shall prevail."
>
> *Judicature Act 36 & 37 Victoria Ch. 66 Sec. 25 Subd. 9.*

The admiralty rule which has, under this statute, been enforced and which doubtless the legislators had in mind when they framed this statute, is the rule relieving the plaintiff who has been guilty of contributory negligence, so far as to authorize an equal apportionment of damages. For at the time of the passage of the statute, such was the fairly established usage of the English Admiralty court.

The authority commonly accepted in England for the equal division of damages in admiralty cases is the decision of Lord STOWELL, then Sir WILLIAM SCOTT, in the case of the *Woodrop Sims*, in 1815. In speaking of collision cases he said :

> " A misfortune of this kind may arise where both parties are " to blame, and where there has been a want of due diligence " or of skill on both sides ; in such a case the rule of law is that " the loss must be apportioned between them as being, as hav- " ing been occasioned by the fault of both of them."
>
> *The Woodrop Sims, 2 Dodson, 83, 85.*

Inasmuch as the *Woodrop Sims* was found solely in fault for the collision under consideration, there was no occasion to consider what rule of damages should be applied when both colliding vessels were in fault. The remark which we have quoted was not therefore pertinent to the decision of the case.

Mr. Marsden, a modern writer, in an article entitled " Two Points of Admiralty Law," published in July, 1886, in the Law Quarterly Review of London, Volume 2, page 357, pointed

out that Sir WILLIAM SCOTT did not in 1815 have sufficient authority to support the rule which he declared of apportionment as an admiralty rule.

The House of Lords adopted the rule, however, in 1824.

Hay vs. Le Neve, 2 Shaw's Scotch Appeal Cases, 395.

In the report of that case another decision of Lord STOWELL, made in 1816, who was still then Sir WILLIAM SCOTT, in the case of *The Lord Melville*, and not otherwise reported, is fully set forth. In the case of *The Lord Melville* Sir WILLIAM SCOTT had again laid down the rule of apportionment in cases where a collision had occurred by the common fault of both vessels, and declared it to be "the ancient rule of the admiralty."

In the same decision he stated what the rule would be in the case of a collision arising through mere misfortune, and in one occasioned by irresistible force of the elements; and in one occasioned by the misconduct of the navigators of only one vessel. But it is impossible to determine from the reported facts which rule was pertinent to the case under consideration.

MR. Marsden shows that the rule of equal apportionment, the *judicium rusticum* of the continent, had not up to that time, 1815, been ordinarily applied in England or on the continent, to cases of collision where both vessels were at fault, and that it was not, in respect of such collisions "the ancient rule of the admiralty."

It had been applied rather to cases of inscrutable fault where it was impossible to determine upon which vessel blame should rest, and to collisions brought about by inevitable circumstances.

In 1746 Sir HENRY PENRICE, a Judge of the English Admiralty, decided the case of the *Eagle vs. The Hopewell*, practically as one of inscrutable fault, and decreed

"That the loss of the said ship Eagle and cargo *from* "*the great contrariety of evidence was so uncertain* that he did "adjudge and decree the damages sustained by the loss of "said ship and cargo to be equally paid and borne by the "plaintiffs and defendants."

Admiralty Cases 1648–1840, published by W. Clowes & Sons, London, 1885.

In the same reports is found the case of the *Mary of Poole* and the *Mary of Weymouth*, decided by Sir CHARLES HEDGES, whose decree after stating that the accident was accidental—"by *casu fortuito*"—condemned the defendants in half damages. This is perhaps the first recorded instance in Great Britain of the application of the *judicium rusticum*, and it is singular that it is found in a case which was decided explicitly upon the ground, not of mutual fault on the part of the two vessels, but of the absence of fault on the part of either.

It is true that in 1789 Sir JAMES MARRIOTT applied the *judicium rusticum* of equal apportionment in the case of the *Petersfield*, which was a case of "both vessels at fault." The case is referred to in the decision of *Hay vs. Le Neve, 2 Shaw's Scotch App. Cases, 395, 402.*

But this same Sir JAMES MARRIOTT, in July of the same year, applied the same rule of apportionment in the collision between the *Resolution* and *Langdon*, which was not a case of mutual fault, but a case where he found that neither ship was in fault.

2 Law Quarterly Review of London, 357, 360.

In that same year too the Court of the Judges Delegates, upon appeal from the Admiralty, decreed an equal apportionment of damages, but upon the express ground that the two ships were "*equally* blamable."

The Friends Good Will 2 Law Quarterly Review of London, 357, 361.

It seems therefore that Sir WILLIAM SCOTT had not sufficient grounds, even if the practice of the English Courts alone was considered, for the declaration in 1815 of his dictum in the case of the *Woodrop Sims*, which has been followed in England ever since, and which has supported the line of decisions upon which this Court relied when in the case of the schooner *Catharine* they found "the well-settled rule in the English Admiralty" to be the rule of dividing the loss.

We find on the continent both in early times and to some extent in modern times the application of the *judicium rusticum*. But it is not associated with the cases of mutual fault.

Grotius says that it was introduced "*ob culpæ probandæ difficultatem*", which would be cases of inscrutable fault, or

such cases as are referred to in the present French Code as those in which there is "*doute dans les causes de l'abordage.*"
Code de Commerce, Art. 407.

It was in the cases of inscrutable fault and in cases of inevitable accident that the rule of apportionment found its earliest play.

The *Droit Maritime de la Hige Hanséatique, Recès de 1614*, provided:

"1. Lorsque deux navires font voile l'un contre l'autre, si "l'un ne peut éviter l'autre en telle sorte qu'ils en éprouvent "tous les deux des dommages, les deux patrons et les "deux équipages devront jurer que cela n'est point arrivé "avec premeditation, mais *par hasard*; et alors ils paieront "le dommage ensemble, soit que l'accident ait eu lieu de jour, "soit qu'il ait eu lieu de nuit.

"2. Lorsque l'accident aura été causé per force majeure, "les deux navires répareront le dommage, d'après la décision "d'arbitres." *Titre X.*

These rules called for apportionment in cases of inscrutable fault and called for a division, according to the judgment of arbitrators, when a disaster came through *force majeure*.

The *Supreme Droit Maritime de Wisby*, promulgated in 1676–87, provided:

"ART. 65. Si un navire cause des avaries à un autre par "abordage, et que l'on porte plainte contre celui qui a causé "le dommage, et que celui-ci consente à affirmer, sous "serment par les saints qu'il en a regret, et *qu'il n'a pu "empêcher le dommage qu'il a causé* il paiera la moitié des "avaries, et si'l ne fait point cette attestation sous serment "par les saints, il paiera la totalité du dommage."

This calls upon each of two colliding vessels to pay a moiety of the loss when *no fault* appears on either vessel; but places the whole damage upon that vessel whose master will not, under oath, declare himself free from fault.

Pardessus, in his collection of maritime laws, shows that by the judgments of Oleron the equal apportionment of damages was made when the collision occurred without the fault of either vessel:

"XV. Si un navire est ancré dans un port, et qu'avec la "marée un autre venant du dehors se heurte contre le premier, "de manière à l'endommager, et que, dans l'un et dans l'autre,

" il y ait des tonneaux de vins enfoncés le dommage total
" est supporté par moitié par chacun des navires et leur
" chargement, pourvu que le patron et l'équipage du navire
" qui a heurté l'autre, jurent sur les saints évangiles *que l'ac-*
" *cident est arrivé sans leur faute et volonté.* On a rendu cette
" décision, afin que l'équipage d'un vieux navire ne fût pas
" tenté de se mettre sur la voie d'un meilleur, dans l'espoir de
" se faire dédommager des suites de se choc, et qu'au con-
" traire la crainte de supporter la moitié du dommage n'ex-
" citât l'équipage à faire tous ses efforts pour se ranger hors de
" la voie."

Pardessus Lois Maritimes, 1, 334.

Cleirac, in commenting upon the judgments of Oleron, styled the rule of apportionment and the "*judicium rusticorum*" as being a practice followed by "arbitres, arbitrateurs & amiables compositeurs."

Cleirac, les Us et Coutumes de la Mer, p. 54.

Article 2 of the *Hamburg Seerecht*, touching of collisions, likewise provided when a ve3sel collides with and sinks another, should pay the full damage, unless the master of the master of vessel which remains afloat should swear that the collision happened *accidentally* (undankes gescheen is), in which event he should pay half the damages.

Pardessus, Lois Maritimes, 3, 348.

The *Customs of Amsterdam, Enchuysen and Stavern*, published in 1406, setting forth the maritime usages of Holland, imposed in Article 12 the same liability for half damages, but only in cases of involuntary or accidental collisions.

Pardessus, Lois Maritimes, 1, 412.

The *Dantzic Ship Laws*, as published in the Black Book of Admiralty, Volume 4, Edition of 1857, pages 348, 349, provided as follows :

49. "Item een scip vaert van Aemsterdamme iof van and-
" eren steden, dat den anderen aen seilde süns sondanckens,
" dat soude den scade half ghelden, maer dade hüt willens, so
" soude hi die, dat ander scip aen seilde, den scade alleene
" gelden."

which the compiler translates as follows :

" Likewise, a ship sails from Amsterdam or another place " (should it be) that it sails into another ship *without intention*, " it shall pay half the damage ; but should it have done it in- " tentionally the ship which has sailed into the other ship shall " pay all the damage."

When the Ordonnance de la Marine was proclaimed by Louis XIV in August 1681, it provided :

" ART. X. En cas d'abordage de vaisseaux, le dommage " sera payé également par les navires que l'auront fait et souf- " fert, soit en route, en rade, ou au port.

" ART. XI. Si toutefois l'abordage avait été fait par la " faute de l'un des Maistres, le dommage sera reparé par celuy " qui l'aura causé."

Valin, in commenting upon Article X, says :

" La decision de notre article est pour *tout abordage for-* " *tuit*, et qui n'a pu naturellement être évité soit en route, en " rade, ou au port."

Valin, Vol. 2, 478, Edition of Becane, 1841.

And later, in questioning whether fault should be attributed to both masters, he says :

" Dira-t-on que l'abordage doit être absolument imputé à " faute de la part des des deux maitres ? Mais á ce compte, ce " qui pourtant est une chimère, puis qu'il y a constamment des " abordages inévitables, et *qu'ils doivent tous être présumés tels,* " *s'il n'y a preuve contraire,* ce serait donc aux deux maitres " &c. &c." *p. 481*

In this Valin gives expression to the general view entertained in France that in the absence of proof of fault every collision should be deemed inevitable.

That is the spirit which governs the French courts at the present time in construing their existing statutes.

The present Code of Commerce of France provides :

" En cas d'abordage de navires, si l'évenement a été pure- " ment fortuit, le dommage est supporté, sans répétition, par " celui des navires qui l'a éprouvé.

" Si l'abordage a été fait par la faute de l'un des capitaines, " le dommage est papé par celui qui l'a causé.

" S'il y a doute dans les causes de l'abordage, le dommage " est reparé a frais communs, et par égale portion pour les " navires qui l'ont fait et souffert." *Article 407.*

It will be seen that this article provides that the vessel upon which damage has fallen shall bear the results of an inevitable accident; that if a collision has been caused by the fault of one vessel she shall pay the entire damage; and that if there is doubt as to the causes of the collision, the damage is to be repaired at common expense, through equal portions borne by the two vessels.

The Code does not specifically state how the damage shall be borne in cases where both vessels are at fault, but the courts find, under the provision which imposes upon the faulty vessel the burden of paying damages, authority to assess the damages against the two guilty vessels *in proportion to their respective faults.*

A modern French writer says:

"Le cas où l'abordage a été causé par la faute respective des "capitaines des deux navires n'est pas prévu par l'article 407 "du Code de Commerce. Par suite, les conséquences d'un "abordage de cette nature, notamment en ce qui concerne le "chargement doivent être réglées d'après les principes du droit "commun."

Fremont; Code de l'Abordage 98.

And again:

"Au contraire dans le cas de faute reconnue commune, "lorsqu'il y a une imputabilité à faire aux deux capitaines de "fautes réciproques qui ont causé l'abordage. Le droit "commun de l'article 1382 reprend son empire, et on doit "attribuer à l'un comme à l'autre la responsabilité du dommage, "proportionellement aux torts de chacun, sans qu'on puisse en "quoi que ce soit trouver dans les termes de l'article 407 une "atténuation quelconque a cette responsabilité (Rouen, 12 "janvier 1864, S. 71.1.181. Cass., 3 mai 1864, ibid, 15 novem-"bre 1871, ad notum. Aix, 15 decembre 1870, Journal de "Marseille, 71.1.70. Conseil d'Etat, 15 fevrier, 1872, S. "73.2.240. Cass., 30 juin 1879, S. 81.1.109; D. P. 81.1.172, "20 juillet 1880; S. 80.1.350; D. 81.1.172. Bordeaux, 10 "decembre 1887, Paud. fr., Jur., 88.2.64. Cass., 3 avril, 1886, "Ann. de droit com. 87.2.40.)

Code de l'Abordage, 163, 164.

And again M. Fremont says:

"En tous cas, les juges du fond ont toujours un pouvoir "souverain pour apprécier la mesure de la responsabilité des

" capitaines et partager le dommage (Cass., 20 juillet 1880, S.
" 80.1.350.)

Code de l'Abordage, 166.

The Court of Rouen, in rendering the decision of January 12, 1864, above cited, stated the principle which governed it very clearly as follows:

" Qu'une responsabilité *proportionnée* à la faute de chacun
" des deux capitaines doit peser sur eux-mêmes et sur leurs
" armateurs, que ce ne peut être le cas d'appliquer à la cause
" le § 1er de l'article 407 qui ne parle que du cas fortuit, et que
" le § 2 ne prévoit que la faute de l'un des capitaines ; il est
" évident que la même dispotiposition s'applique par les mêmes
" motifs en cas où les deux capitaines sont en faute, que dés
" lors *le devoir du juge est de rechercher le degré de la faute im-*
" *putable à chacun, de manière à proportionner la réparation du*
" *dommage commun suivant la gravité des fautes respectives.*"

France is by no means alone in this treatment of damages arising from mutual fault.

Belgium in its Code de Commerce provides specifically for a division proportionate to the gravity of the respective faults of the vessels.

§ 229. " S'il y a faute commise à bord des deux navires, il
" est fait masse des dommages, lesquels sont supportés par les
" deux navires dans la proportion de la gravité qu'ont eue les
" fautes respectivement constatées comme cause de l'événe-
" ment."

—*Code de Commerce, Livre* 2, *Titre* 8, § 229.

The International Scandinavian Code which furnishes the Sea Laws for Sweden, Norway and Denmark, makes similar provision in Article 220.

This Code was approved by King Christian IX of Denmark in April 1892, and in the same year was adopted in Sweden and Norway.

The official translation published in Copenhagen in 1893, reads:

ART. 220 " Whenever damage is done to ship or cargo
" through collision between ships and only one of these is in
" fault, this one shall make good all the damage occasioned.

" If both parties are in fault the court shall decide, taking
" the fault committed on each side into consideration whether
" and to what amount compensation shall be given by either
" party, or whether each party shall bear its own loss.

" In deciding the question as to which party has been in " fault, the court shall take into special consideration whether " or not there has been any time for deliberation."

ART. 221 " If a collision was caused by accident or it can " not be proved that it was due to any fault committed by " either party, each ship shall bear its own loss."

International Scandinavian Code, Ch. VIII.

The inequitable rule of an equal division of damages has disappeared entirely from these Scandinavian countries, although it was a feature of their early laws in respect of collisions occasioned by *chance*. For instance, the Code of Christian V, published in 1756 for the use of English inhabitants of Danish settlements, provided for the apportionment of loss in such cases as it appeared by the oaths of the master and crew of the colliding vessel that *the collision could not be avoided*.

In Italy also when the collision has resulted purely from chance or through *force majeure*, the resultant damages must be borne by the vessel upon whom they have fallen.

Codice di Commercio, Lib. II. Tit. VIII. Art. 660.

If the collision has been caused by the fault of one of the vessels all losses and damages are charged upon her. *(Art. 661).*

If, however, there is doubt as to which of two vessels the fault is imputable, or if there is a common fault, each carries the damages and losses which she has sustained, without right of reclamation, but each is held to make reparation *in solido* for all damages and losses to cargo or to persons on board *(Art. 662).*

There are no provisions in Italy now for the division of damages.

Spain has provisions almost identical with those of Italy.

Codigo de Commercio, Liv. III. Tit. IV. Sec. Art. 827.

So too has Germany.

Commercial Code of Germany Art. 737.

Holland, in cases of common fault, specifically charges

upon each vessel its own damage. She applies the same rule to collisions occurring through accidents ; but in cases where the fault is inscrutable she masses the damages of the two vessels, retaining so far the old practice of the maritime law, and apportions the aggregate *in proportion to the respective values* of the vessels.

Wetboek van Koophandel Nederlandsche Arts. 535, 536, 538.

Portugal's laws are similar to those of Holland, she retaining the principle of apportionment only in cases of inscrutable or doubtful cases (Havendo duvida sobre a causa da abalroaçã), and then making the apportionment in proportion to the value of the respective vessels.

Codigo Commercial Portuguez, Parte II., Liv. 1, Tit. 9, Sec. IV., Art. 1570.

Thus it is seen that the *judicium rusticum* has almost disappeared from the continent of Europe, being retained in France and Belgium, and to some extent in Holland and Portugal, but only in its old function for the adjustment of losses *when the fault is inscrutable.*

It is in that single class of cases, the cases due to inscrutable fault, in which the *judicium rusticum* may be commended as equitable. Undoubtedly such cases were far more numerous in the seventeenth and eighteenth centuries and in the early part of the nineteenth century than they are now. The rules of navigation were local, and lacked the precision and harmony and publicity of the International Statutes and the rules of this day. The facilities for discovering the truth and perpetuating proofs were crude.

The sailing craft responded less readily to the wishes of their navigators than do the great vessels which are controlled by powerful machinery and by steam.

The navigators themselves did not have the advantages of information which the close communication of the present day affords.

In those days the cases of inscrutable fault were not uncommon and the *judicium rusticum* afforded easy and equitable relief.

The rules of Oleron, the laws of Wisby, the Sea Laws, all of which admitted the *judicium rusticum*, applied it only in cases where there was *no* fault on either side, or where the fault was inscrutable.

The counsel for the *Victory* is in error on page 36 of his brief in citing these rules and laws as applicable to a collision brought about by the joint fault of both vessels. He will not find it so applied until the early part of the nineteenth century, and then *only in England*.

An equal division of damages in cases where both vessels have been found in fault has never been a part of the maritime law.

The courts of the present day have facilities for procuring and preserving testimony which were unknown even fifty years ago. They have, moreover, through the voluminous reports of adjudicated cases, means of keeping themselves in touch with all tribunals of the civilized world. They are able through the accurate transcript of proofs, and through the diffusion of adjudications and through the perfection of the rules of navigation, to measure with a precision unattainable heretofore the respective faults of two colliding vessels.

This being so, equity, which is the controlling principle of admiralty, calls upon the courts to so distribute the damages resulting from such a collision as to throw upon each vessel an adequate share of the burden. The rule of equal apportionment "has been stigmatized by at least one eminent "judge as inconsistent with natural justice."

Law Quarterly Review of London, Vol. 2, pp. 351, 362.

The rule by which the trial judge weighs and measures the faults of two colliding vessels and imposes upon them a proportionate amount of the resultant damages, is applied either by force of unwritten law or by force of statute in many of the continental courts, and the International Law Association at its seventeenth conference held in Brussels in October, 1895, discussed the question of its wider application. The members of the Conference are eminent jurists of all countries, the Chambers of Commerce of the important cities of the continent and Great Britain, the principal associations of ship-

owners, steamship companies, insurance companies, associations of adjusters and individuals.

Mr. Gray Hill of Liverpool, who stated that he was authorized to represent the Chamber of Shipping of the United Kingdom, the Liverpool and London Steamship Protection Association, the West of England Steamship Owners Protection and Indemnity Association, and the American Chamber of Commerce of Liverpool, introduced the following resolutions :

"That in the opinion of this Association the law which "enables the court to apportion the total of the damage done "to ships in collision, when both are in fault, in proportion to "the gravity of the faults committed by them respectively, is "preferable

"(1) to the law which leaves each ship to bear its own "damage ;

"(2) to the law which divides the total damage according "to the value of the ships respectively ; and

"(3) to that which divides it equally.

"That in the opinion of this Association, the first men- "tioned law should be adopted by all nations."

Report of Seventeenth Conference International Law Association, October 1895, p. 220.

Mr. Hill's resolution was seconded by Mr. Miller of London, and was supported by Mr. Clunet of Paris and by Mr. Langlois of Antwerp, who stated that such system was already established in their respective countries, and was in every way satisfactory.

After full discussion, the resolutions were adopted by a vote of eighteen to two.

Report of Seventeeth International Law Association, October, 1895, p. 226.

The courts of the United States are awaiting the decision of this Court to authorize them to proceed in the future to adjust the equities in collision cases by an apportionment of damages upon the offending vessels in proportion to their respective faults.

Fifth.

THE WRITS OF CERTIORARI SHOULD BE DISMISSED, AND THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE AEFIRMED WITH INTEREST AND COSTS.

BUTLER, NOTMAM, JOLINE & MYNDERSE,
Proctors for the Plymothian's cargo.

WILHELMUS MYNDERSE,
Advocate.

No. 67.

Brief of Hughes for McKeey.

FILED.
OCT 1 1895
JAMES H. McKENNEY

Filed Oct. 1, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~375~~ 67.

JOHN MacINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MacINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No.

JOHN MACINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MACINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

To the Honorable Supreme Court of the United States:

The petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann

Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Leitch, and the British Steamship Investment Trust, Limited, respectfully shows to this honorable Court as follows:

The petitioners are owners of the British steamship *Victory*, which on her way into Norfolk about 4.15 p. m. November 12, 1891, collided with the British steamship *Plymothian*. The *Victory* was coming in light on a flood tide. The *Plymothian* had just finished coaling at Lambert's point and was starting to sea. The collision occurred near buoy No. 7, between Craney Island light-house and Lambert's Point pier. The vessels came together with the bow of the *Victory* against the port side of the *Plymothian*. The result was that the *Plymothian* sank and that a large hole was made in the starboard bow of the *Victory*, entering at the starboard side and almost going through the port side, causing the plates on the port side to bulge outwards, but, the *Victory* being light, the injury was above the water line. The *Plymothian* was loaded with cotton, which was damaged by water. The *Victory* was damaged to the extent of over $14,000 and the *Plymothian* to the extent of over $41,000, the cargo of the *Plymothian* being damaged about $72,000.

The petitioners promptly libeled the *Plymothian* and the owners of the cargo of the *Plymothian* libeled both the *Victory* and *Plymothian*. These libels, however, were merged into the limited liability proceeding that each vessel took immediately thereafter.

The claim of the *Victory* as to the facts of the collision is that she weighed anchor in Hampton Roads at 3.30 and started to Norfolk; that she met several steamers which gave her two whistles, which she accepted, thus placing her on the eastern side of the channel; that south of Craney island there were three schooners going down the river, forcing her to remain on the eastern side (as crossing to the other side would have involved crossing their bows and unnecessary danger); that the eastern side was clear and that

she came up, having reduced her speed just before reaching Craney island; that just after passing Craney Island light-house she saw a steamer on the western side of the river near the Merrimac buoy; that at this time the vessel was three or four points on her starboard bow; that she gave this steamer two whistles, the vessels being then some distance apart; that the steamer answered so that the master of the *Victory* saw two puffs of steam, but only managed to hear one whistle on account of its imperfections; that, to make things more certain, the *Victory* repeated her signal of two whistles, but the other vessel commenced to show by her movement that instead of keeping down the western side of the channel she was porting, thus crossing to the eastern side of the channel and throwing herself across the bows of the *Victory;* that as soon as those on board of the *Victory* observed this porting they reversed and gave danger signals; that they were not able to port themselves on account of a schooner which was on the *Victory's* starboard bow, and which would have been run over; that the other vessel continued to come ahead; that at the time of the collision the *Victory* had about killed her headway in the water (though it is possible that with a flood tide she had not killed her way over the ground); that the *Plymothian* ran across the *Victory's* bows, driving a piece of her plates through from starboard to port, and that the nature of the injury to the *Plymothian* was such that she was beached and sunk.

The contention of the *Plymothian* is exactly the opposite. They insist that they came out from the pier at Lambert's point and hugged the eastern line of the channel. They insist that they gave the first whistles, being a single signal repeated twice, and that the *Victory* crossed the signal by giving two whistles. They insist the *Victory* was not on the eastern side of the river coming in. They insist that she was proceeding too rapidly, and that she did not back until just before the collision, and they also insist that

they did back, and had some sternway at the time of the collision.

The district court decided that the *Victory* was solely to blame for the collision. It based its opinion upon the position that the International Rules of 1885, and not the rules of navigation laid down in section 4233 of the Revised Statutes and the supervising inspector's regulations, governed in the waters where the collision took place; that the *Victory* violated article 21 of the International Rules, requiring steamers in narrow channels to keep on the starboard side (a rule not found in the Revised Statutes or the supervising inspector's regulations), and that this was the proximate cause of the collision.

The court, in reaching this decision, expressly held that the port-helm rule (No. 15 International, No. 16 Federal) did not apply, as the vessels were not meeting in such direction as to involve risk of collision, nor did it blame the *Victory* on the score of signals or speed.

It found no fault with the *Plymothian* at all, although even according to the evidence of the *Plymothian* it had given its first signal to the *Victory* when they were a mile and an eighth apart, and did not reverse until, according to their testimony, the *Victory* had crossed signals with them and gotten within two or three hundred yards (Mardon, R., 265), and although the photographs show that at the time of collision the *Plymothian* was moving faster than the *Victory*. Nor did it find fault with the *Plymothian* for her imperfect lookout, although their own testimony showed that her navigators did not hear the first signal of the *Victory*, and did not see a schooner that was in front of them in plain sight.

From this decision the owners of the *Victory* appealed to the circuit court of appeals at Richmond, and the owners of the cargo of the *Plymothian* also appealed, because the *Victory* alone was held in fault and they were deprived thereby of all remedy against the *Plymothian*.

The circuit court of appeals held that the *Victory* was in fault for not taking the western side of the channel; held also that the International Rules governed these waters, and that she therefore violated article 21 of these rules; and went still further, and held the remarkable proposition that the Federal rules embodied in section 4233 contained a similar rule requiring vessels to keep to the starboard side of the channel or, as the court expresses it, to keep to the right. It does not cite this supposed rule from section 4233, but the petitioners presume that it has confused the port-helm rule with article 21 of the International Rules and held them synonymous, though no greater mistake could possibly be made, the district court having rightly held that the port-helm rule did not apply, as the vessels were not moving in such direction as to involve risk of collision. The circuit court of appeals, however, reversed the decision of the lower court as to the *Plymothian*, and held that the *Plymothian* was also in fault. The context of the opinion would rather indicate that the fault which they ascribe to the *Plymothian* was her failure to back in time. They speak of this as a very venial fault, "an act of omission," and they characterize the action of the *Victory* in not keeping on the starboard side by some very emphatic adjectives.

Accordingly they held both were in fault, but thought the fault of the *Victory* the greater, and they required the *Victory* to pay her entire bond, amounting to $67,500, and the *Plymothian* to simply make up the deficiency to the cargo-owners, a deficiency which, including interest, aggregated about $20,000, and they laid down the novel doctrine that a court in its discretion has power, if it thinks one vessel more in fault than another, to divide the damages between them unequally, and not to follow the rule of half damages, which they admit to be almost universal.

The petitioners appeal to this Court to review that decision, as it contains two questions, not simply of national, but

of international importance, namely, what waters are controlled by the International Rules, and what is the proper rule for dividing the damages where both vessels are in fault, even though the fault of one may exceed that of the other.

Many questions were discussed during the progress of this long litigation which have lost their importance, in view of the ground taken by the district court and the court of appeals in their opinions. As they are mainly questions of fact, it would serve no useful purpose to go into them elaborately, and therefore they will be reviewed as briefly as possible for the mere purpose of placing the Court in possession of the history of this litigation.

The first of these questions was whether, assuming for the moment the truth of the facts as claimed by the *Victory*, she was right in starboarding her helm.

DID THE PORT-HELM RULE APPLY?

According to our contention, when the *Plymothian* came out from Lambert's pier and swung around into the channel, the tide being flood and therefore sweeping her up the river, she necessarily went over, not of course to the western edge, but into the western half of the channel—that is, west of mid-channel—and in this position was three or four points on the *Victory's* starboard bow, at which time the *Victory* gave her two signals. It was contended in the lower court that even on this state of facts, if true, they were meeting end on, and the *Victory* should have given her one whistle and applied the port-helm rule.

That rule is in the following language:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other."

This rule has been frequently before the courts, and the conclusion has been that vessels are not meeting end on unless they are in such position that, if at night, each would see both colored lights of the other. As long as they are moving on courses which, if at night, would expose green to green or red to red, it is not a case where the rule applies.

This understanding of the law is universal among courts and seamen, and is well expressed in the old couplet:

"Green to green, or red to red,
Perfect safety, go ahead."

When vessels are moving on courses so they will clear each other if each holds its course, the law does not require them to swing around and each cross the other's path for the mere sake of a port helm.

Marsden, in his admirable work on collisions, says that the indiscriminate application of the port-helm rule has been a fruitful source of collision (p. 422).

When vessels are meeting each other dead ahead or slightly on each other's port bow, then the rule undoubtedly is that each must port; but when each is on the other's starboard bow as much as a point or more, then, as there is no risk of collision while that position is maintained, the rules of the road not only justify, but require that they shall pass each other starboard to starboard.

This is carried out in the navigation of our local waters by rule 1 of the Pilot Rules for Lakes and Seaboard, prescribed by the supervising inspectors.

That rule is in the following language:

"When steamers are approaching each other head and head, or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other, and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall

pass to the right, or port side, of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting head and head, or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left or starboard side of each other.

"NOTE.—In the night steamers will be considered as meeting head and head so long as both the colored lights of each are in view of the other."

In the case of the *Manitoba* (2 Flip., 241), Brown, district judge, held that this port-helm rule only applied when, if it was a case at night, each vessel would see both of the lights of the other. It was a case where the divergence was only three-fourths of a point, each being that much on the other's starboard bow, and the court held that starboarding was the proper course. This decision was affirmed both by the circuit court and by the Supreme Court.

The Manitoba, 122 U. S., 97.

The testimony of the crew of the *Victory* that they were forced to the eastern side by passing vessels was much attacked, and witnesses from two or three steamers that went down that evening were produced by the *Plymothian* to show that they had passed the *Victory* port to port. It is not a sufficient impeachment of a witness to show that in a harbor of the importance of Norfolk some steamers passed differently from his contention. The fact that the *Luray* and *Virginia Dare* passed port to port does not show that the *Louise* and *Accomac*, which were the steamers named by the *Victory's* witnesses, did not pass port to port.

DID THE VICTORY BACK SEASONABLY?

The *Victory* was also attacked on the ground that she did not stop and reverse in season. The proof on the side of the *Victory* as to this is that she gave a single signal;

that she saw a response, but could not make it out on account of its indistinctness; that she thereupon repeated her signal, and that she reversed as soon as she saw indications in the opposing vessel of swinging across her path.

The language of the backing rule is as follows:

"Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed or, if necessary, stop and reverse."

According to the testimony of the *Victory*, confirmed by some of the witnesses for the *Plymothian*, she had already slowed down. She did not, therefore, have to stop and reverse, under the very letter of the rule, until it was necessary, and it was not necessary until this eccentric movement of the *Plymothian* was developed. At that time it was too late, as far as the *Victory* was concerned, for she was coming in with a flood tide of two knots, and therefore took a much longer time to kill her headway than the *Plymothian*, which had just started and had the tide against her. This fact made the *Victory* the favored vessel.

The Galatea, 92 U. S., 439.
The Diana (1894), A. C., 629.

WHISTLES.

The question of whistles was the one most vigorously contested in the lower court, and as to which the evidence is hopelessly in conflict.

The contention of the *Victory* is that she gave the first signal of two whistles, and that the *Plymothian* crossed her signal. The contention of the *Plymothian* is that she gave the first signal of one whistle, and that the *Victory* crossed her signal.

The contention of the *Victory* was confirmed by disinterested testimony from the steamer *Princess*, which was anchored near the collision spot, that testimony being taken

only two days after the collision, and by disinterested testimony from the barge *Storm King*, which was taken about a year after the collision. On the other hand, a very great number of witnesses were produced by the *Plymothian* at the trial three years afterwards to show that she gave the first signals. Their testimony, however, is as much in conflict with the crew of the *Plymothian* as it is with the crew of the *Victory*. The *Plymothian* claims to have given her first signal when she was about off buoy 9, at Lambert's point, and the *Victory* about off Craney Island light. At this time the vessels were a mile and an eighth apart, and the testimony of both sides is to the effect that the whistles of English steamers are inferior. The usual signaling distance, as is well known, is about a half a mile, so that it would not be an unpardonable crime if the navigators of the *Victory* did not hear this first signal.

The navigators of the *Plymothian* claim that they gave one signal, then another, then another, and finally the danger signal, and that the *Victory* answered only their third signal. The testimony of their disinterested witnesses is that they only gave two single signals to the *Victory*, and that the *Victory* answered the first, and the testimony of the navigators to the effect that they gave three single signals is contradicted by some of their own crew. Lyons, their helmsman, only heard two; Ham, one of the crew, only heard two, and Shroeder, another of their crew, only heard two. In addition, the proof shows that many salute whistles were given, that there were many tugs blowing around Lambert's point, and it was a venial fault in the crew of the *Victory* not to have heard all these whistles, which disinterested witnesses immediately around the *Plymothian* and not a mile and an eighth distant, like the *Victory*, positively swear were not given.

Neither the district nor appellate court, however, found any fault with the *Victory* on the score of her whistles.

COMPARATIVE SPEED.

Another question much discussed in the lower court was the speed of the two vessels. The witnesses for the *Plymothian* did not hesitate to make the wildest statements as to the speed of the *Victory*, some of them putting it as high as ten or twelve miles an hour.

Careful measurements will show that from Craney island to buoy 7 the distance is 1,150 yards, and from buoy 9 to buoy 7 is 750 yards. The district court in its opinion states that from Craney island up to buoy 7 is 1,200 yards, and to buoy 9 is 1,967 yards, and that the distance between the two buoys is 735 yards. This is a patent mistake, for if it is 1,967 yards from Craney island to buoy 9 and 1,200 from Craney island to buoy 7 it is bound to be 767 from buoy 7 to buoy 9. In the rough, then, we may say that the distance from buoy 7 to Craney island is one and one-half times that from buoy 9 to buoy 7. The testimony of the *Plymothian* navigators places the *Victory* off Craney island and themselves off buoy 9 when the first signals were exchanged; hence, according to their own testimony, the *Victory* moved 1,200 yards while they moved, say, 800 yards—that is, she was moving one and one-half times as fast only; but the *Victory* had behind her a current of two miles an hour, and the *Plymothian* had against her a current of the same amount. Disregarding the current entirely, if the *Plymothian* was moving at the rate of four and a half miles an hour the *Victory* was only moving at the rate of seven miles an hour, and when we take the current into account the *Plymothian* appears to have been moving through the water faster than the *Victory*.

THE VICTORY'S COURSE.

The question of the *Victory's* course was also much discussed in the lower court. The pleadings of the *Plymothian* themselves only claim that the *Victory* was in mid-channel, so that the testimony of some of their witnesses, that she was west of mid-channel, is as preposterous as their statements of her speed.

THE PLYMOTHIAN'S COURSE.

The question as to the *Plymothian's* course was also much confused. She claims that she went out from Lambert's pier, turned sharp around buoy 9, passing it within a few yards only, and kept straight down the edge of the eastern side of the channel, moving under a port helm all the time. The *Victory* claims that in coming out from the pier into the channel she necessarily went out partially across the channel. As she was 260 feet long and the tide was flood—that is, on her starboard bow—common sense would seem to sustain this claim. If a ship 260 feet long can turn sharp around a buoy as a buggy turns sharp around a street corner, she must have a fifth wheel in her like a buggy. Such vessels have not as yet been invented. Some of their own witnesses place her much further out than the eastern edge of the channel, which her navigators claim she always held. For instance, J. I. Clark, disinterested, testifies that she went out "not quite to mid-channel" (R., 389). Brown from Craney Island light saw her "about the middle of the channel" (R., 346). Ham, one of her own crew, says that in going out they headed straight across the river (R., 189). Lyons, another, speaks of receiving a certain order "when we got out in the middle a way" (R., 209). Her testimony that she hugged the eastern bank is necessarily impossible. According to these measurements, it is about 800

yards from buoy 9 to buoy 7. They claim that after they passed buoy 9 their helm was slightly a-port until shortly before the collision, when it was put hard-a-port. How did she move within 40 to 60 yards of the bank a distance of 800 yards without running aground?

These questions, however, are immaterial in view of the opinions, though the petitioners feel bound to allude to them, as they can concede nothing by silence. The important questions in the case are those which were emphasized in the opinion of the courts, namely, whether the International Rules govern the navigation of these waters, and thereby made the *Victory* so emphatically in fault as the appellate court seems to think, and whether, even if she was guilty of greater fault than the *Plymothian*, the court had any power to divide the damages according to mere caprice and not follow the rule of half damages.

The importance of the question whether these waters are controlled by the International Rules of 1885, instead of the Federal statutes and Supervising Inspector's Rules, arises from the fact that the International Rules of 1885 contain an article (No. 21) in the following language:

"In narrow channels every steamship shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such ship."

This rule, despite the assertion of the court of appeals, has no counterpart in section 4233 or the Supervising Inspector's Rules, and yet the violation of this rule is the main fault which the court has found against the *Victory*. If, therefore, the International Rules do not apply to these waters, but the Supervising Inspector's Rules, the action of the *Victory* in the collision in taking the eastern side is vindicated, for, as is well stated in the last edition of *Marsden on Collision, page 465*—

"Questions may arise as to the application of the starboard-side rule or article 21 in waters where (as, for example, the River Thames) local rules of navigation are in force; but where there is no rule as to the side of the channel upon which ships are to navigate, it is submitted that in such case article 21 has no application, and that absence in the local rules of a rule requiring vessels to navigate on one side of the channel or the other leads to the inference that vessels are free to navigate in any part of the channel."

Hence, if those waters are governed by the Federal statutes and the Supervising Inspector's Rules, all parts of that channel were free to the *Victory*.

DO THE INTERNATIONAL OR FEDERAL RULES APPLY?

In deciding whether the rules of 1885 apply in certain waters of the United States we must look, not to the language of the rules themselves, but to the language of the enacting clause of the statute adopting them. The fact that they have rules for narrow channels or even for harbors is no indication that Congress intended them to apply unless the enacting clause shows such to have been the intention. They must have such rules, for they apply in the harbors of barbarous countries which have no rules of their own; they apply in the narrow channels of archipelagoes, which are not local waters; they apply in straits not under the dominion of any one power, and hence the fact that such rules are contained in the International Rules is no proof that Congress intended them to apply unless Congress has shown its intention that they should. The enacting clause will show that Congress expressly excluded them from applying in local waters, for it says that they shall apply "upon the high seas and in all coast waters of the United States except such as are otherwise provided for." This means except such other waters as are otherwise provided for. The waters otherwise provided for are made

sufficiently plain by the repealing clause of the statute, which says:

"All inconsistent laws are hereby repealed except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States."

Therefore the harbors, lakes, and inland waters of the United States are otherwise provided for, namely, by section 4233 of the Revised Statutes and by the Supervising Inspector's Rules, and therefore the International Rules do not apply upon them.

Yet in the face of this language, so clear that he who runs may read, the district court held (R., 453) that all tide waters navigable from the ocean with navigable depth for ocean craft are coast waters in the meaning of article 21.

It ought not to be hard to find out what is meant by coast waters. Burrill's Law Dictionary defines the coast as "the edge or margin of land next to the sea, the seashore," and the *Garden City case, 26 F. R., 775*, much relied upon by our opponents, defines coast waters as embracing "not merely waters that face the open sea, but bays, passages, inlets, and sounds formed by the islands that skirt the coast." It will require a remarkable geographer to bring the Elizabeth river within this definition. How a body of water thirty miles from the ocean, divided therefrom by a body of land twenty miles square out of sight of the ocean and connecting with it by a narrow channel commanded even by the antiquated guns of Fort Monroe, can be called coast waters passes the comprehension. Not only that, but the locality of this collision was really in a harbor.

Section 2010 of the Code of Virginia, as amended by Acts of Assembly, 1889–'90 (private), p. 623, taken from the chapter of the code establishing a board of harbor commissioners for Norfolk, Portsmouth, and Norfolk county, provides—

"The jurisdiction of said board for the purposes of this chapter shall extend to the Elizabeth river and all branches

and tributaries thereof along the water front of the cities of Norfolk and Portsmouth and Norfolk county."

In the *New York-Lawrence Collision case, 54 F. R., 542,* the right of a harbor master to anchor vessels along this spot was sustained first by the district court (decision unreported) and then by the circuit court of appeals; and yet waters within the jurisdiction of a harbor master are not harbors! A harbor is a place where vessels are accustomed to resort and moor, a safe station for ships, a place of refuge, shelter, rest, and the proof in this case is that many vessels were anchored along in this vicinity waiting their turn at a coal pier, and yet that is not a harbor!

The district judge seemed to think that some terrible consequences to commerce might happen if a vessel starting on a foreign voyage had to change from the International Rules to the Federal Rules and refuses "to dwarf the river into a local harbor subject to the provincial domination of a town council and the crude regulations of ever-changing town officials." The place of this collision was not within the harbor limits of the city of Norfolk, was not subject to the regulations of any town officials or town councils, but was under the jurisdiction of the board of harbor commissioners, a State board created for the purpose of protecting the harbor and prescribing rules for its governance. The "town council" which enacted the Federal Rules was Congress, a body designated by the judge in a late silver article as itself an international board.

This court has frequently sustained even State laws applying to local waters like harbor commissioners' rules, quarantine rules, and pilot rules, and the district court itself has found vessels in fault in this very harbor for violating rules of this very board as to speed, and for twenty years has been applying in the navigation of these waters section 4233 and the Supervising Inspector's Rules.

Nor is there anything in the contention that foreign ves-

sels are subjected to inconvenience in changing from International to Federal Rules on reaching the waters of the United States. There is not a port of any size in any enlightened country which has not special rules for its navigation. The most important are collected in the appendix of Marsden on Collision. The Rivers Thames, Mersey, Scheldt, Clyde, and many others have them. Apparently this fact has not dwarfed the growth of London, Liverpool, or Glasgow as compared to Norfolk. When vessels come into local waters they are supposed to take local pilots. The vessels in this case were both in charge of local pilots who are presumed to know the Federal Rules; hence there is no hardship in bringing them under the purview of these rules.

As was well said by Chief Justice Waite in the *Sarmatian*, *5 Hughes, 158–'9:*

"It is next insisted that as the *Sarmatian* was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover, notwithstanding she exhibited hers so late. The two vessels were on American waters and not on the high seas; they were in the Chesapeake bay, and *infra fauces terræ*. A vast majority of the commerce carried on there was coastwise and local. The *Sarmatian* was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by Congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground simply because the vessel it meets is sailing under a foreign flag. Pilots are employed, not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be

presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly."

The fact that the International Rules of 1885 are not intended to apply is shown by their very language. Those rules, for instance, although they prescribe a full set of lights for sea-going vessels, prescribe none for river steamers. It is the Federal statutes and the Supervising Inspector's Rules which prescribe lights for river steamers. Those lights for such steamers are not only the colored lights, but the two range lights, consisting of a bright light on the stem and a bright light on the flagstaff aft, whereas the International Rules prescribe only the lights carried by sea-going vessels, namely, the two colored lights and the bright masthead light. Hence, if the International Rules governed and not the Federal Rules and Supervising Inspector's Regulations, every river steamer that runs out of this harbor is improperly rigged and has been for years, and this very district court in the case of the *Conoho, 24 F. R., 758*, held a steamer in fault for not being rigged with these range lights.

It is settled law that the soil of these waters and of Chesapeake bay belong to the State and their shell-fish and oysters to the citizens of the State, and yet we are told that they are coast waters!

In the *Cotton Plant, 10 Wall., 577*, this Court held that the waters of the Roanoke river above Plymouth were included in the term "inland waters," and repudiated the idea on which the district court based its decision that they were coast waters because they were navigable from the ocean.

The circuit court of appeals in its decision (also holding that the International Rules governed) first cites as authority the *Britannia case, 153 U. S., 130*, and says this Court held

this rule 21 binding upon vessels in the harbor of New York. The most casual examination of this case shows that this Court held nothing of the sort; that the rules of 1885 were not once alluded to in the opinion, and that the quotations were entirely from the rules contained in section 4233. The court is equally unfortunate in its reference to what it terms the *John Knox case*, *1 C. C. A.*, p. 323, where it says that the circuit court of appeals for the second circuit reached the same conclusion. The reference is meant for the *John King case*, and the circuit court of appeals for the second circuit reached no such conclusion. The International Rules were not once alluded to, and section 4233 was the only one which was quoted from.

And in the *Lisbonense*, *53 F. R.*, *297*, this same circuit court of appeals for the second circuit, which is represented as applying the International Rules, calls attention to the fact that the International Rules apply below the Narrows and the Federal Rules above the Narrows of New York harbor, and calls attention to various differences between them.

As for the position of this Court on the subject, it not only did not apply the International Rules in the *Britannia case*, but in the subsequent case of the *Breakwater*, *155 U. S.*, *252*, it applied section 4233 and not the International Rules, and in the very recent case of the *Oregon*, *158 U. S.*, *at p. 204–'5*, it intimates (without positively deciding) that the International Rules did not apply in waters such as those; so that no utterance of this Court or of the circuit court of appeals for the second circuit sustains the position of the court on this point.

After thus misquoting these two courts the circuit court of appeals goes on to hold that this phrase in the repealing clause, excepting harbors, lakes, and inland waters, meant the Great Lakes and their harbors and inland waters connected therewith and the inland waters at long distances from the sea. If this was the construction the word "lakes"

alone would have accomplished the purpose, and it is hard to see why the words "harbors" and "inland waters" were inserted.

It would be impossible to apply this starboard-hand rule in harbors. To require vessels going into harbors and approaching vessels at anchor to keep an unswerving course to the right is to ensure collision. Hence, the *Victory* was not at fault in the matter which has been made by both courts the pivotal charge against her.

This brings us to the discussion of the faults of the *Plymothian*. If the testimony of the *Victory* is to be believed as against her testimony, then she was the one that crossed signals and she was much the greater in fault; but for the purposes of this discussion on the question of damages we will take her own testimony, and by that two acts of negligence are clearly proved against her.

THE PLYMOTHIAN'S IMPERFECT LOOKOUT.

In the first place, her own testimony shows that she was not keeping a proper lookout. According to that testimony, her navigators did not hear the signals of the *Victory*, which her disinterested witnesses testified were given, and did not see a schooner until after the collision, which the overwhelming preponderance of testimony proved to be there. They confess to not seeing a schooner which many others saw, to not hearing what many other disinterested witnesses all around them heard, and therefore they were at fault.

The district court held that, though their lookout was imperfect, it did not contribute to the collision. It bases this on the ground that the *Victory* had no right to order the *Plymothian* to take a different course, and that therefore the *Plymothian* had no right to change her course, and that therefore, even if they had heard this first signal of the *Vic-*

tory, they would not have been justified in changing their course, and therefore their inattention was immaterial.

This position, put in plain English, is about equivalent to holding that if one vessel is in fault the other vessel not only has the right, but is in duty bound, to run her down.

It assumes that the only thing which the *Plymothian* could or should have done, in case her lookout had been more attentive, was to change her course, but this view of the district court ignores entirely the very important consideration that if she heard this first cross-signal she could have stopped and backed more promptly.

And this brings us to the other and still more serious charge against the *Plymothian*, to wit, her failure to reverse until too late.

THE PLYMOTHIAN'S TARDY REVERSING.

The crew of the *Plymothian* contend in this case that their engines had been reversed for four minutes at the time of the collision.

If they had given this statement as a mere matter of judgment we might excuse them on the ground of the well-known unreliability of such estimates, but they have laid themselves open to a more serious charge.

We charge that in order to make a case on this point they have deliberately doctored their engineer's log.

The testimony shows that this log, as is the practice, was written up on the evening of that date—that is, after the collision had occurred. It was the more incumbent upon them to write it up naturally and truthfully, but their writing up of what happened in the morning and what happened in the afternoon is on two entirely different theories. Their witnesses testify that it is usual when orders come fast together, so that all cannot be taken down, to simply say in their log "engines working to order." Accordingly we find in this log that in coming into the harbor that

morning they simply say "worked engines to order into coaling berth." On the other hand, in going out they say: "Stand by to order 4 p. m.; full speed 4.05 p. m.; full speed astern 4.10 p. m.;" ship struck 4.14 p. m.; full speed ahead 4.15 p. m., and yet their own witnesses admit that their log does not show all the orders that were given (R., 168–'9). This at once shows that their log was fabricated. If they attempted to write anything they ought to have written everything. It is unreasonable to suppose that at a moment like that, when, as one of their witnesses says, there was danger that the men in the engine-room might be killed, they should stop to note the exact time, and yet only noted the exact time of two or three things.

It is incredible for another reason. According to this testimony, the engines of the *Plymothian* were moving backwards four minutes before the collision, and yet their pleadings only claim that at the time of the collision the headway of the *Plymothian* was entirely checked, and the *Victory's* injuries show that she was moving ahead. She had a two-knot current against her, which would enable her to stop with much more ease, and yet they contend that, though they had barely gotten up steerage-way, according to some of their witnesses, having proceeded such a short distance that they had not gotten up full speed, and though they had the tide against them, they had reversed their engines for four minutes without being able to stop their ship. This, too, is absolutely preposterous. If they could not stop her in four minutes with the tide against her, then, indeed, she must have been proceeding at a rate compared to which the greyhounds of the Atlantic are nothing. This log is suspicious and incredible.

If anybody knows how quickly a steamer can be stopped, it ought to be her engineer.

Pearse, one of the engineers of the *Plymothian*, testifies (R., 182–'3):

"Q. You have stated that when that vessel is under way, full speed ahead, and orders for the engines to go full speed astern are given, that it takes some time to overcome the movement ahead before she moves backwards through the water, and you estimate that time at about a minute?

"A. *About one minute. One minute would be the outside.*"

* * * "Q. How soon will she go astern? Does that depend upon how much headway she has?

"A. Yes, sir; if she has full speed ahead it will take longer to go astern, but she will only take about a minute."

Independent of the testimony of her engineer, any one with any experience knows that it does not take four minutes to start a ship backwards in the water even from full speed. A boat that is as unwieldly as that should be condemned as a public nuisance.

Hence, this entry in the log of the *Plymothian* is false, and deliberately false. It is worse than a crime—it is a blunder. We have the right, therefore, to reject the testimony of the *Plymothian* entirely on the subject of her reversing. Moving as slowly as she was, with a head tide, she ought to have been stopped and could have been stopped, according to the testimony of her own engineer, in less than a minute, and therefore she could not have been reversed as long as four minutes. Hence, she did not reverse until just before the collision. She has a heavier burden in this respect than the *Victory*, because she had the tide to help her manœuvre and the *Victory* had the tide to oppose her.

The testimony of the *Plymothian's* crew, when they are not asked the direct question how many minutes they were reversing, shows that they reversed but a very short time before the collision. For instance, Schroder testifies that he first saw the *Victory* over his starboard bow (not his port); that the *Victory* was then "no ways off" (R., 205), and this was before any reversing at all.

Lyons says that he cannot tell how long they were reversed, but it was a little while. (R., 210.)

Wood is specially emphatic. It is to be remembered that according to the testimony of the navigators of the *Plymothian* the third whistle and the order to reverse were coincident, so that they claim that it was four minutes from the third whistle till the collision. Wood, however, says that the interval between the danger signal and collision was about the same as the interval between the other signals, which he had previously estimated at 20 to 30 seconds, and that at the time the two vessels were only 150 feet apart, so that Wood shows that the *Plymothian* did not reverse until 20 or 30 seconds before the collision and at a time when the vessels were only 150 feet apart.

And even Mardon, the master, who testifies that the danger signals, reversing, and hard-porting were coincident, says that at the time of his hard-porting the *Victory* was only from 200 to 300 yards off. He also says, contrary to the great mass of evidence, that at that time the *Victory* was coming up full speed. Hence, according to his own testimony, he did not reverse until he was within 300 yards of the collision, though his first signal had been given 1⅛ miles off and was unanswered.

The *Plymothian* certainly moved part of this 300 yards before the collision. He does not contend that when he reversed his engines she stopped in her tracks. But let us assume, for the sake of illustrating this point, that the *Plymothian*, the very second she reversed, immediately became still, or, in the language of his answer, that her headway was then entirely checked. If the *Victory* was moving at full speed at a point only 300 yards off, with a strong tide behind her, her full speed being 10 miles an hour, it would take her less than a minute to move 300 yards. If she was not at full speed, but moving at half speed or 5 knots an hour, it would take her less than two minutes to move 300 yards; hence, on Mardon's own statement, even assuming that the *Plymothian* moved not at all, his engines were reversed for less than two minutes before the collision, and yet

his log is brought into court with an entry purporting to have been made by the clock, which is a physical impossibility and a patent imposture.

The very photograph which was offered to show the injuries of the *Plymothian* proves that at the time she was going forward, for an inspection of it will show that its front edge is perfectly smooth, whereas its back edge is rolled and curled back. If she had been stationary the cut on the two sides would have been exactly similar; if she had been moving backward the front edge would show a roll. The fact that the back edge is rolled back shows that she had at least some motion across the bows of the *Victory*, and the further fact shown by our testimony and photographs that there was a hole in the starboard bow of the *Victory*, and a piece of iron had gone through that and lodged up against the other side, pressing it out, although the stem itself was not broken, shows this still more conclusively.

It is difficult to see why, in view of this act of the *Plymothian*, the circuit court of appeals should have considered the fault of the *Victory* the gravest and that of the *Plymothian* slight. The main fault found against the *Victory* was her taking the wrong side of the channel, and that this was not such a culpable one sufficiently appears by the opinion of the district judge, wherein he says:

"East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however, and, owing to the eastward bend of the channel around buoy 9 to Lambert's Point pier, navigators coming up from Craney island are apt to head directly for Lambert's Point light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel." (R., 448–'9.)

The circuit court of appeals speaks of the negligence of the *Plymothian* as merely "an act of omission."

The line between acts of omission and commission is sometimes hard to draw and depends very much on the way you look at it. If a driver sees a child in a public road in ample time to stop and deliberately and wilfully runs over it, he is in one sense guilty only of an act of omission, but it is a novel doctrine to hold that on this account his fault is a slight one. But however this may be and however negligent the *Victory* may have been and however venial the negligence of the *Plymothian* may have been, the petitioners submit that the act of the circuit court of appeals in dividing the damages otherwise than equally is unsustained by authority and as dangerous as it is novel.

THE HALF-DAMAGE RULE.

The opinion cites but one authority to sustain its right to divide damages according to caprice, and that is the case of the *Max Morris, 137 U. S., 1.* The reference to this case is as inapposite as the reference to the *Britannia* and *John King* cases. There is not a line in the *Max Morris* case which holds or intimates that an admiralty court has any discretion as to dividing the damages in collision cases otherwise than equally where both are in fault. That was a personal-injury case, and the real question involved was whether, in case of a libel for personal injury, the collision rule of half damages applied or the common-law rule of contributory negligence allowing no damages. The court, in deciding that in such cases it could make a small award, expressly did so on the ground that it was not a collision case, and the opinion throughout assumes that in collision cases the rule is otherwise.

It is otherwise both in England and America. In the case of *The Catharine, 17 How., at p. 177,* this Court says:

"Upon this view of the case it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

"The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. (9 Law Rep., 30.)

"This seems now to be the well-settled rule in the English admiralty. (Petersfield *vs.* The Judith, Abbot on Sh., 231, 232; The Celt, 3 Hagg., 328, n.; The Washington, 5 Jurist, 1067; The Fiends, 4 E. F. Moore Rep., 314, 322; The Seringapatam, 5 Notes of Cases, 61, 66; Vaux *vs.* Salvador, 4 Ad. and Ell., 431; The Monarch, 1 Wm. Rob., 21; The De Cock, 5 Monthly Law Mag., 303; The Oratava, 5 *ib.*, 45, 362.)

"Under the circumstances usually attending these disasters we think the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides in the navigation."

The English law is well expressed in the case of *Devaux vs. Salvador, 4 Ad. and Ell. (31 E. C. L.), 420*, where Lord Denman said:

"But the collision causes the ship insured to do some damage to the other vessel; and whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two."

See also *Abbot on Shipping, 330–'1.*

These decisions have been followed in numberless cases both in England and America. It is difficult to gather from them any support for the doctrine that damages can be divided otherwise than equally.

Novel as this doctrine is on authority, its dangers exceed its novelty. It is perilous to leave anything to discretion. The more definite the law, the more clearly the rights of parties are defined, the more intelligently can they be advised as to their rights, the more certainly can the result of

litigation be ascertained and the amount of litigation diminished. To allow any one of the nine circuit courts of appeal or the sixty district judges such latitude as to the proportions in which damages should be divided is to put the profession completely at sea. Certainty disappears and litigation increases. The caprice of the individual judge is substituted for the definite rules of precedent, and the remark of the old satirist that equity might as well be measured by the chancellor's foot as by the chancellor's conscience will obtain modern significance. Judicial legislation should never be encouraged, especially when it is undertaken by inferior courts.

It has been frequently said and is the modern trend of opinion that there are no degrees of negligence, and division into ordinary, gross and light has been characterized as merely the description of negligence with an epithet.

"I can see no difference between negligence and gross negligence. It is the same thing with the addition of a vituperative epithet."

Rolfe, B., in Wilson vs. Brett, 11 M. & W., at p. 116.

"It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

Lord Denman in Hinton vs. Dibbin, 2 Q. B., 650.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authorities."

Mr. Justice Bradley in R. Co. vs. Lockwood, 17 Wall., at p. 382, followed in Briggs vs. Spalding, 141 U. S., at p. 151.

No yard-stick can be invented by which negligence can be measured. No court can attempt to apportion its exact degrees. Even the doctrine of comparative negligence hinted at by a few courts has not met with approbation.

It is an Illinois innovation, and a distinguished text-writer has stated that it will admit of question whether or not it has not created more confusion than anything else. (*2 Wood on Railroads, last ed., p. 1506, sec. 322b.*)

This decision of the circuit court of appeals, tending to divide negligence into degrees, is therefore a step in the direction of an exploded doctrine.

Your petitioners therefore submit that the decision of the lower courts in this case is erroneous:

1. In holding the *Victory* to blame at all.

2. In holding that she violated a rule which has no existence on the inland waters of the United States.

3. In holding that her act in so doing was gross negligence.

4. In holding that she should be made to pay more than half the damages.

5. In not holding the *Plymothian* solely to blame.

And they assign this action as error.

They respectfully submit that in view of the large amounts involved in this case, and of the two exceedingly important legal questions involved, namely, as to the application of the International Rules and as to the proper rule for dividing the damages, it is pre-eminently a case in which this Court should issue a certiorari promptly settling these questions.

Your petitioners herewith file a certified copy of the record in the said cause.

The attention of the Court is called to the fact that the mandate is only suspended until November 1, and the peti-

tioners therefore feel impelled to ask a prompt consideration of this petition by the Court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said circuit court of appeals in the said cause, to the end that said cause may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of said act, and that the said judgment of the said circuit court of appeals in the said cause may be reversed by this honorable Court in the particulars above mentioned.

And your petitioners will ever pray, etc.

PETITIONERS,
By ROB'T M. HUGHES,
Counsel.

STATE OF VIRGINIA, }
Corporation of the City of Norfolk, } *To wit:*

Personally appeared Robert M. Hughes, who, being duly sworn, on his oath says that he is counsel for John MacIntyre, Jr., and others, the petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned in the district court of the United States for the eastern district of Virginia and in the United

States circuit court of appeals for the fourth circuit; that he has read the petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

ROB'T M. HUGHES.

Sworn to before me and subscribed in my presence this 21st day of September, A. D. 1895.

[SEAL.] H. H. LITTLE,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

To The Port of Plymouth Steamship Company, Limited, and to The Canton Insurance Company, Limited; The Triton Insurance Company, Limited; The Indemnity Mutual Marine Insurance Company, Limited; The Atlantic Mutual Insurance Company, The London Assurance Corporation, The Copartnership of C. T. Bowring & Company, The Standard Marine Insurance Company, Limited; The British and Foreign Marine Insurance Company, Limited, and The President and Directors of the Insurance Company of North America:

Take notice that on Tuesday, October 1, 1895, we will file a petition in the Supreme Court of the United States to bring up on certiorari from the circuit court of appeals for the fourth circuit the record in the suit of The Canton Insurance Company, Limited, *et al. vs.* Claimants of Steamship *Victory* and Claimants of Steamship *Plymothian* and Claimants of Steamship *Victory vs.* The Canton Insurance Company, Limited, *et als.* and Claimants of Steamship *Plymothian* for the purpose of having the same reviewed and

reversed, and that on Monday, October 14, 1895, we will submit the said petition to the Court for action.

JOHN MACINTYRE, JR.,
THOMAS C. MACINTYRE,
JAMES ALLEN MACINTYRE,
CUTHBERT HUTCHINSON,
PETER ALLEN,
GEORGE Y. BLAIR,
WILLIAM H. GOULD,
JAMES BROTHERTON,
CAROLINE REA,
THOMAS W. SPENCER,
JOSEPH FRAIN,
ANN BLENKINSOP,
MICHAEL J. WILKINSON,
SUSAN WEEKS,
RICHARD LEITCH, and
THE BRITISH STEAMSHIP INVESTMENT TRUST, LIMITED,
By ROB'T M. HUGHES, *Proctor.*

Service accepted September 20, 1895.

WILHELMUS MYNDERSE,
Proctor for Canton Insurance Company, Limited, and Others.

FLOYD HUGHES,
Proctor for Port of Plymouth Steamship Company.

No. 66 & 67.
Reply Brf. of R. M. Hughes for Victory.
Filed Oct 15 1895.
OCT 15 1895
JAMES H. McKENNEY

United States Supreme Court.

Nos. [redacted].

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.

IN THE MATTER OF THE PETITION OF JOHN MACINTYRE AND OTHERS, CLAIMANTS OF THE STEAMSHIP VICTORY, FOR A WRIT OF CERTIORARI.

REPLY TO BRIEF OF COUNSEL FOR CARGO.

ROBERT M. HUGHES,
Proctor for the Victory.

W. T. Barron & Co., Law Printers, Norfolk, Va.

United States Supreme Court.

Nos. 757, 758.

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.

IN THE MATTER OF THE PETITION OF JOHN MACINTYRE AND OTHERS, CLAIMANTS OF THE STEAMSHIP VICTORY, FOR A WRIT OF CERTIORARI.

REPLY TO BRIEF OF COUNSEL FOR CARGO.

ROBERT M. HUGHES,
Proctor for the Victory.

It is not proposed, in this brief, to further discuss the questions of law and fact raised on the petition, except one remark, in reply to the point made on page 9 of the counsel's brief, to the effect that the difference between what the Victory

would have to pay in case the rule of equal division was established, and what she would have to pay in case the rule of unequal division was established, is only a few thousand dollars.

In deciding whether to issue a writ of certiorari, this court has been accustomed to go, not so much upon the amount involved as upon the importance of the question decided. In this case, nothing can be more important than a prompt settlement (if it has not already been settled) of the method of division of damages in collision cases. There are now about sixty district judges and nine intermediate appellate courts at liberty to divide these damages, according to their caprice, instead of by any settled rule, and unless this court shall promptly interpose, the confusion will be indescribable. The actual difference, as shown by a careful calculation, is over $9,000.

The counsel next contends, on page 10 of his brief, that the cargo, being entirely innocent, should not be delayed for two or three years by the settlement of this question as between the vessels, but that the court should direct immediate payment of the cargo claims and leave this for future adjustment.

Such action on the part of this court would be tantamount to a denial of justice, for, if the Victory were to pay the cargo her full bond, and attempt to go against the Plymothian, she would at once be met with the point that there is no contribution among wrong doers, and to issue a writ of certiorari under such conditions would be a mockery.

Besides, he can move to advance the cause. We will join in the motion.

The counsel next contends, on page 10 of his brief, that the vessels should be required to give further bonds to secure the claims of the cargo, and bases it on the idea that the sureties are not residents of the Eastern District of Virginia, and

that it is necessary to avoid any question as to responsibility for accumulations of interest subsequent to the decree.

The bonds given in the case are not contained in the record, for the reason that the stipulation of counsel, entered into for the purpose of shortening, as much as possible, a record necessarily very bulky, provided that they should be omitted, but recited that they had been given. (R. 480-1.)

In order to consider this point properly, a certified copy of the bond, given by the owners of the Victory, is printed as an appendix to this brief. It is true that the sureties were residents of New York, a very common practice in the Eastern District of Virginia, where it is difficult to obtain sureties for large amounts; but it will appear that the bond has on it as sureties the well known firm of Baring, Magoun & Co.; it will further appear that it is expressly conditioned and provided for any appellate court to which the cause might proceed, showing that such was in contemplation of the parties at the time; and last, but not least, it will still further appear that the counsel for the cargo, at the time the bond was given, placed the following endorsement upon it:

"The foregoing stipulation for value is hereby approved in form, amount and sufficiency of surety. Dated New York, December 9th, 1891. Butler, Stillman & Hubbard, Proctors for Libellants."

There is no charge or intimation that the sureties have since become insufficient, nor have they.

As to the point that additional security is necessary, in order to provide for the accumulations of interest subsequent to the date of the decree, that would be entirely unnecessary, as the sureties on that bond are liable for such interest.

This is expressly decided in the case of the *Manitoba*, 122 U. S., 97. The sureties are not questioning their liability in any way, and if they did, this decision would be a lion in their path.

The claimants of the Victory are many in number, and are all residents of Great Britain. It is extremely difficult, among so many, to raise the requisite amount of funds which would be necessary in case a new bond is required; the correspondence among so many, and probably among a great many more underwriters back of them, would be tedious, and any one, by refusing to contribute his proportion, might put it out of the power of the others to give a bond.

In order to give these bonds at the outset, all these arrangements had to be made, heavy commissions had to be paid to those who signed the bond, and these commissions collected among the various parties liable. They have gone to this trouble, they have secured at this great trouble and expense the sureties necessary, under the idea of all parties that this was done once for all, and to require them now, in the absence of any intimation that the bond has become unsatisfactory, to go to all this trouble again, when they no longer have local representatives, when their vessel is no longer in the District, would be to put them to an expense equally unnecessary and heavy, and might probably result in their failure to secure the relief to which they are entitled.

If they had made out a case calling for the interposition of this court by certiorari, the court ought not to allow their case to be defeated by mere incidental questions.

Respectfully submitted,

ROBERT M. HUGHES,

Proctor.

APPENDIX.

VICTORY BOND.

DISTRICT COURT OF THE UNITED STATES, }
EASTERN DISTRICT OF VIRGINIA. }

In the Matter of the Petition of the Owners of the Steamship Victory for a Limitation of Liability.

WHEREAS, A libel was filed in this court on the 27th day of November, A. D. 1895, by Stephen Augustus Ralli and others, against the steamship Victory, her engines, boilers, machinery, tackle, apparel and furniture, to recover damages for collision, under which libel the vessel has been attached, and is now in custody of the marshal.

AND, WHEREAS, on the petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, limited, owners and claimants of the said vessel, her appurtenances, etc., the court ordered that stipulations might be given by the said owners of the Victory, or some one of them, with sufficient sureties, in the sum fixed by an appraisement; and, whereas, the appraisers determined the value of said vessel and her appurtenances to be $67,500, such stipulation to stand in the place and stead of the said vessel and her appurtenances, according to the provisions of the Acts of Congress for restricting the liability of ship owners, etc.; it appearing that there was no freight on said voyage.

Now the condition of this stipulation is such that if the said owners of the said steamer Victory, claimants, and George C. Magoun shall, upon the final order or decree of the district court, made and entered in the above stated cause or in any cause or proceeding commenced, or which may be commenced in the said court, to establish and enforce any lien or claim upon the said steamship Victory, her engines, boilers, machinery, tackle, apparel and furniture, and the final order or decree of any appellate court to which the said proceedings or any of them may be removed, or at any other time, as

the said court or courts shall direct, pay into the registry of this court the said sum of $67,500, the appraised value of the said vessel, as aforesaid, or such part thereof as the said court or courts shall direct, then this stipulation to be void; otherwise to be and remain in full force and virtue.

JOHN MACINTYRE, JR., AND OTHERS,
Owners and Claimants of Steamship Victory, Her Appurtenances, etc.
S. ELCOATE, *Master.*

BARING, MAGOUN & CO.,
By H. L. GRIGGS,
GEO. C. MAGOUN.

Taken and acknowledged this 9th day of December, 1891, as to Baring, Magoun & Co., and Geo. C. Magoun, before me,

Notarial Seal.

GEORGE CROMWELL,
Notary Public, Richmond County.

Certificate filed in New York County.

Southern District of New York, ss.:

George C. Magoun, party to the above stipulation, being duly sworn, doth depose and say that he resides in the City of New York; that he is worth the sum of One Hundred and Thirty-five Thousand Dollars ($135,000) over and above all his just debts and liabilities. GEORGE C. MAGOUN.

Sworn to before me this 9th day of December, 1891.

Notarial Seal.

GEORGE CROMWELL,
Notary Public, Richmond County.

Certificate filed in New York County.

The foregoing stipulation for value is hereby approved as to form, amount and sufficiency of surety.

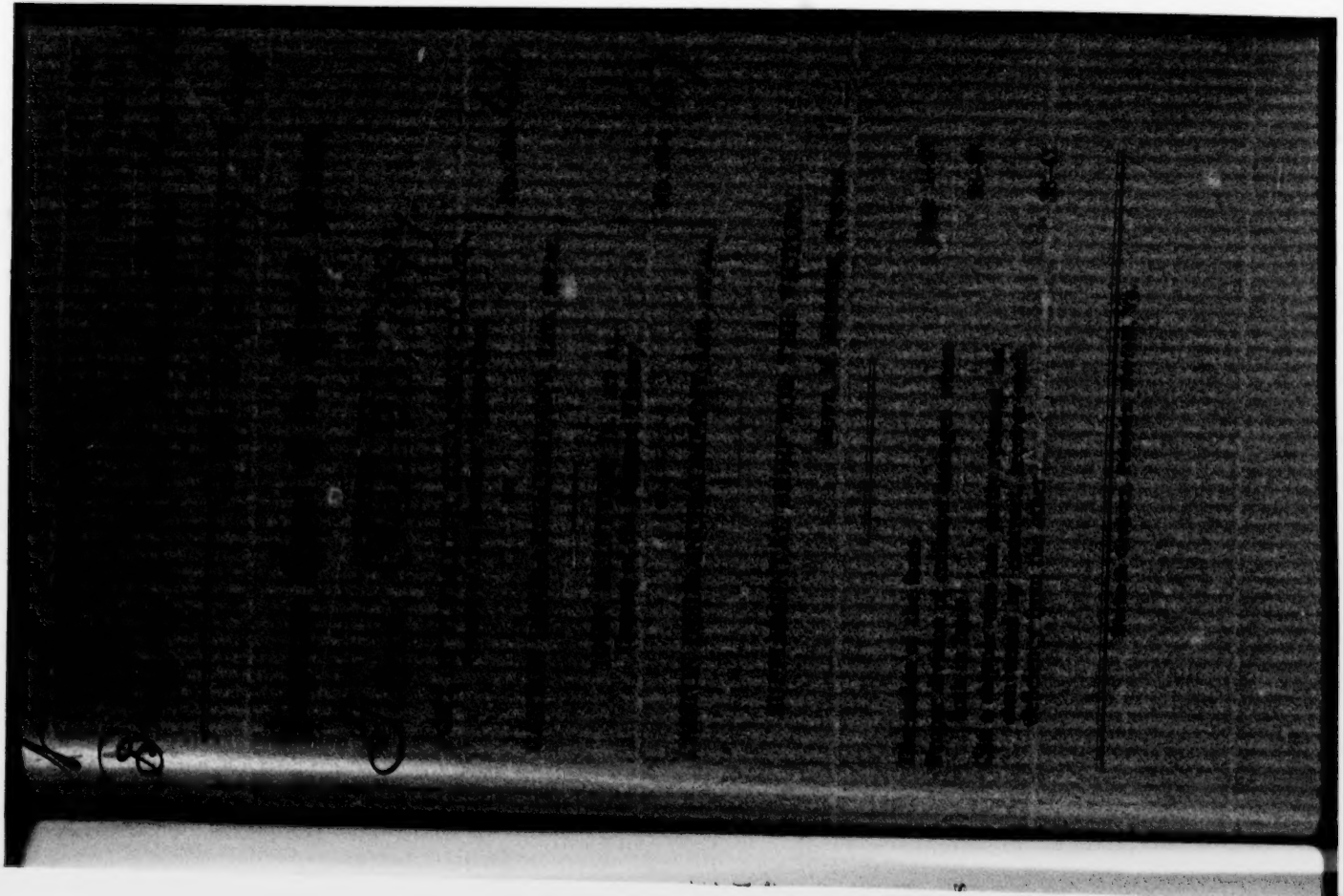
Dated New York, December 9th, 1891.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

A copy—Teste:

H. S. ACKISS,
Clerk U. S. District Court, Eastern District of Virginia, Norfolk.

U. S.
District Court
Seal.



United States Supreme Court.

OCTOBER TERM, 1896.

Nos 353 and 354.

VICTORY—PLYMOTHIAN COLLISION CASES.

SUPPLEMENTARY BRIEF FOR THE VICTORY.

The different questions in this case were discussed in some detail in the petition for a certiorari filed by John MacIntyre and others, owners of the Victory, and the brief printed as part thereof. This is intended to be supplemental to that brief, and the court is requested to read that and then follow it with this. Reference is made to that brief for the statements as to the facts, but as the time allowed for oral argument is too limited to discuss the numerous questions involved in this case, it is thought best to elaborate some of the points therein discussed.

The perusal of the opinion of the District Court (R. 447), and the opinion of the Circuit Court of Appeals (R. 498), will show that the main fault which both courts condemned in the Victory, was the fact that she took the eastern side of the channel in coming up just before the collision.

The basis of this holding was the decision, first, of the District Court, and then of the appellate court, that the waters of Elizabeth River were subject to the International Rules and not to the Federal statutes and the Supervising Inspectors' Rules, and that therefore she violated Rule 21 of the International Rules, requiring vessels to keep on the

starboard side of the channel. The main discussion up to this point in the case has been on that proposition.

This question has been settled by this court since the decisions in the lower courts and since the filing of these petitions for a certiorari. It has expressly decided in the case of *the Delaware, 161 U. S., 459*, that the International Rules do not apply in pilotage waters, thus sustaining the position which the Victory has taken from the outset in this case. As there is no starboard-hand rule contained in the Federal Rules or the Supervising Inspectors' Rules, this decision vindicates the navigation of the Victory as to this point as a question of law.

"It is proper, perhaps, to remark here that I do not subscribe to the doctrine advanced on behalf of the libellants against the Milwaukee, that vessels navigating rivers must, in all cases, when meeting, keep to the right of the centre of the navigable channel. I know of no such law in this country, and there is no such custom in the navigation of the channel in question. Vessels navigating rivers in this country, like vehicles in a highway, may use any part of the channel they may see fit, observing, however, in all cases when meeting or passing other vessels, the ordinary rules of navigation."

The Milwaukee, 17 Fed. Cas., 431.

Hence the only ground on which they could hold the Victory to have been in fault, as far as this rule is concerned, is that it is the custom of the Elizabeth river to navigate in this way. No such custom is proved in the case. It is true that Mardon and Henley give their opinion as marine lawyers that the law requires it, but Mardon had never been to Norfolk before and does not profess to testify about it as a local custom, and even Henley, the pilot, does not speak of it as a local custom, but as a general rule governing all channels. In other words, they agree with the District Court and Circuit Court of Appeals on the law questions involved, and differ with this court.

But they do not prove a local custom. Not an iota of proof of that custom is in the case.

As the failure of the Federal Rules and the Supervising Inspectors' Rules to insert the starboard-hand rule could not have been unintentional, we may therefore contend that there is no law or custom requiring the Victory to keep to the starboard-hand coming up, but that in harbor and pilotage waters the whole channel is free for navigation.

It is hardly thought worth while to discuss that portion of the opinion of the Circuit Court of Appeals which confuses the porthelm rule with the starboard-hand rule and states that there is such a regulation in the Federal statutes. The rules are so different that it is a matter of surprise that the court should have confounded them.

In the Lawrence case, 54 F. R., 542, a vessel was held to blame by this very court for going along the western side of the channel instead of the east, on account of the fact that vessels were anchored there.

Goodwin, one of the Plymothian's witnesses, proves a similar state of affairs on the occasion of this collision (R., 380).

THE WHISTLES.

The first evidence on this subject is that of the three men from the steamer Princess, taken but two days after the accident. (Wigham, R. 21; South, R. 25, and Rankin, R. 30.) They sustain the contention of the Victory.

The next on the subject is that of the Victory's crew.

The next is that of Swain, of the barge Storm King, taken about a year afterwards. He sustains the Victory's contention. (R., 289.)

Of the Plymothian's crew, the first three examined know practically nothing on this subject. (Scullard, R., 165; Cronquist, R., 173; Pearse, R., 178).

Their next witness, Ham, knows a great deal about the whistles. He says (R., 185):

'Before we left the pier the whistles were blown, to give vessels notice that we were coming, several times, and also the whistles were blown to salute the tugs Pioneer and Commodore. Q. Did you hear those whistles, and how were they with respect to being loud and clear? A. Perfectly distinct; then, after that, my attention was drawn to the whistles by hearing our whistle blown once. I heard it blow twice before I heard any answer from the Victory, and then she replied with two blasts * * * after he replied with two blasts we gave three blasts, and the engines went full speed astern," etc.

Their next witness, Schroder, says (R., 202):

"Shortly after we got around the buoy and got straightened up, I took notice that our whistles were blowing. * * * Q. You were walking backwards and forwards and heard the whistles? A. I heard two blasts; yes, sir. Q. Had you heard any whistles before that time? A. No, not that I took any notice of. Q. I mean from your vessel at the time she left the pier or afterwards? A. After she left the pier? Q. At the time she left the pier did you notice any whistles blowing? A. No, sir. Q. How far after you passed buoy 9 was she when you heard those whistles? A. Very shortly. Q. What was that whistle? A. Our whistle, a single blast. Q. How many times? A. Three times I heard distinctly. * * * Q. Did you hear any answers to those whistles? A. I didn't notice any answer."

Their next witness, Lyons (helmsman), says (209):

"Q. Did you hear the whistle of your steamer going? A. Heard two separate whistles, sir. Q Of how many blasts? A. I heard three blasts to back the engines. Q. You heard three separate whistles and then heard three blasts to back the engines? A. Yes, sir. Q. Did you hear any whistles except those? A. I didn't notice. Q. Did you hear any whistles as you left the pier? A. I didn't take notice of it. Q. Did you hear any whistles or salutes sounded upon passing any small boats? A. I

didn't take notice. Q. The only whistles you did observe were two single blasts, which were given previous to the three blasts when the engines were put astern? A. Yes, sir. Q. You heard two single blasts and three for astern? A. Yes, sir. * * * * Q. How were they in respect to being loud, clear and distinct? A. They were clear; I could hear them clear. Q. Was there any steam or anything in them to obstruct them? A. They sounded clear to me in the pilot-house."

Again, page 210:

"Q. Did you hear any signal given to (by?) the other vessel, the Victory? A. Never took any notice of it, sir."

Their next witness, Hendema (deputy helmsman), on page 219, Plymothian evidence, says:

"Q. What was the next order? A. Then we heard some whistle blow and steadied the helm. Q. You did hear some whistles blown; do you know what they were blown to? A. No, sir, didn't take any notice."

Again, page 220:

"Q. Did you hear the whistles of your steamer given? A. Yes, sir. Q. How were they in respect to being loud and clear? A. The whistles were all right; they tried them before they left the pier, sir; tried the whistles. Q. And you heard them during this voyage down the river blow several times? A. Several times. * * * Q. Did you hear any signal blasts of your whistle sounded? A. Yes, sir. Q. How many? A. Three; close to the other. Q. Then what did you hear? A. Afterwards she blew three quick after each other, sir."

Their next witness, Baird (p. 231), says:

"Q. Did you hear the whistles sounded from your steamer that day? A. Yes, sir. Q. How were they in respect to being loud, clear and distinct? A. I heard them three times. Q. How were they in respect to sound? A. Clear sound, sir. Q. Nothing the matter with it? A. No, sir. Q. What whistles did you hear? A. I heard three single whistles being blown. Q. Did you hear any others? A. Only three for astern."

Again, on page 232:

"Q. Did you hear any answers or was there any answer? A. I saw answers but couldn't tell what they were. Q. When did you see them? A. After the second whistle. Q. You don't know what that was? A. No, sir; don't know how many whistles were blown. Q. Do you know whether she blew any at all or not? A. Yes, sir; she blew something, but I couldn't tell you what, sir."

Wood, page 238, says:

"Q. State what whistles you heard upon first leaving the pier? A. Three short ones for leaving the pier. Q. Three short ones were blown just as you were leaving the pier? A. Just close after; I don't know what was the meaning of it. Q. Did you hear other whistles after that? A. Yes, sir, afterwards. Q. Was anything the matter with the whistles on that afternoon? How were they in respect to being loud and clear. A. The ones aboard of us were loud, distinct. Q. The whistles on your own vessel were loud and clear. A. Yes, sir." * * *

"Q. After passing that buoy did you hear any whistles on the Plymothian? A. Yes, sir. Q. Just describe what whistles you did hear? A. I heard three, one after the other, plain and distinct." * * Q. Did you hear any whistle after that? A. Just some little time before the collision there were three or four little whistles."

And on p. 244 he testifies that American whistles are much better than English.

Ecrath, page 256:

"Did you hear the whistles of the Plymothian at any time that afternoon? A. I heard one set just as I went down from the forecastle head. Q. Did you hear it blowing before that time as you were passing any tugs? A. Yes, sir; I heard three as we passed—I don't remember the name of the boat—the water boat. * * * Q. Did you hear any whistles in your shop? A. Yes, sir; but I didn't notice what they were. Q. These whistles you heard, how were they in respect to being loud and clear? A. The first one I heard when I went down from the fore-

castle head, they were clear. Q. How about the ones to the water boat? A. Yes, sir; they were clear."

Mardon (page 262), in describing the start from the wharf:

"I rang the telegraph slow ahead; the pilot gave the order slow ahead, and I rang the telegraph; immediately that was done the whistle was blown. Q. Who blew that whistle? A. The pilot blew the whistle." * *

Again, page 264:

"A. As we came close to the buoy 9 the water boat Pioneer was lying close to the east of the buoy and the Commodore was lying to the west— Q. Out in mid-channel? A. Yes, sir; and my being acquainted with both of them, I gave a salute in passing. * * * Q. You heard those whistles? A. Certainly. Q. How were they in respect to being clear and distinct? A. Clear and distinct. Q. How about being loud? A. Loud, clear and distinct; no water or steam. Previous to leaving the dock the first thing I did was to blow the whistle to blow the water out. Q. That was some minutes before leaving the dock? A. Yes, sir. Q. And upon leaving the dock you blew the signal whistle that you were leaving? A. Yes, sir. Q. And afterwards blew the whistles to the Commodore and Pioneer? A. Yes, sir."

Again, page 264:

"Q. Such being the situation of the vessels, what signal was given, if any? A. One whistle given by us. Q. Who sounded that whistle? A. The pilot. * * Q. Did you hear any reply from the Victory? A. No reply from the Victory. Q. What was done then? A. Still went on, keeping on the east side, and gave the second blast. Q. Did you hear any reply to that? A. No, sir. * * * Q. And hearing no answer to the second whistle, what did you do? A. Gave the third whistle. * * * Q. Did you hear anything then? A. Heard two whistles. * * Q. What did you do then? A. On hearing these cross-whistles we blew three times and put the ship full speed astern."

We will next take the pilot, though some disinterested witnesses were examined before he was put on the stand.

He says (p. 360):

"The captain went on the bridge and cleared the whistle—blew the steam out—and I took hold of the whistle after he was through with it and blew one long whistle for a dock whistle."

Again, 361:

"I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm so I could see the whole side of his ship and the round of his stern, and I went along a few minutes. All at once the captain says, 'Pilot, what's that fellow doing? and I blew one whistle again and he answered with two, and I immediately blew the danger signals and reversed the ship full speed."

It will be observed in reviewing this testimony of the master and pilot, who were in charge of navigation, that they claim to have given three separate single blasts to the Victory and she did not answer the first two, but answered the last one with a double blast. Those men were in charge of the navigation, and if the Victory did answer those blasts, they certainly ought to have heard her answer. It will be observed, however, that Lyons, their helmsman, only heard two, and Ham also heard only two, and Schroder also heard only two, and nobody on that boat seemed to hear any reply to either of the first two of the Victory.

Now, bear in mind this discrepancy in their own crew as to the number, and the fact that even those responsible for the navigation of the Plymothian and supposed to be on the lookout heard no reply to their first two whistles, and with these facts in view, take up their outside testimony:

Etheridge, from the tug Commodore (R., 353):

"All I seen her do was to come out from the dock and

straighten herself down the river. She passed fifty or seventy-five yards from Buoy 9, and opposite Buoy 9 or thereabouts she blew the Victory one whistle, and, I suppose, in probably a minute, or probably not quite that long, she blew her one more; the Victory answered her with two. In a very little while afterwards he blew the Victory three whistles and reversed his engines. * * * Q. Did you hear the Plymothian blow her whistle as she left the dock? A. Yes, sir; heard her blow as she come out of the dock. Q. Just describe how those whistles were? A. One whistle at a time, clear and distinct. Q. You had no difficulty in hearing them? A. None whatever. Q. There has been something said about there being water or steam in the whistle. Do you recollect anything of the kind? A. No, sir. I was standing on the forward deck of the Commodore and heard them distinct myself."

Goodwin (page 373):

"Well, when he came out of the dock he came slow, and leaving the dock he blowed one long whistle. Q. That's the usual whistle? A. The usual whistle coming out of the dock. * * * Q. Now, did you hear any other whistles? A. I heard him blow just as soon as he hauled around the buoy and straighten up; he blew one whistle; of course, that was to the Victory. * * Q. Did you see or hear anything from the Victory? A. I saw the steam of two whistles, but never heard the whistles. Q. You saw the puffs of steam from the whistle, but never heard the sound? A. Never heard the sound at all. Q. What did the Plymothian do? A. Then, a little while after that—I suppose two or three seconds—he blew the one whistle again. * * Q. What did the Victory do then? A. The Victory blew two. I heard those. Q. Those were the first sounds you heard from the Victory? A. Yes, sir. Q. Well, what did the Plymothian do after the Victory blew those whistles that you heard? A. Well, now, he blew, as well as I can remember, three or four short blasts."

Again (page 382):

"Q. Now, as I understand, the first whistle you heard was the dock whistle? A. Yes, sir. * * * Q. You

didn't hear him blow his throttle-valve at all before that? A. No, sir, I don't remember it. Q. What was the first noise you heard from the throttle-valve of the Plymothian? A. I think he blew three whistles to the Pioneer. Q. That was the second? A. That was the second; that was before he got turned around good."

Again, page 387:

"Q. How long was it between the first whistle of the Plymothian and the puffs of steam from the Victory? * * * * A. I don't know; I think it was about three or four seconds. Q. How long after you saw those puffs of steam from the Victory was it before the Plymothian blew her second blast? A. About the same."

John I. Clark, p. 388:

"I was standing on the old dock when the Plymothian left the pier. She blew one long whistle leaving the dock and * * three whistles as a salute to the Pioneer which were answered by the Pioneer. Then she went down, keeping on the eastern side of the channel; blew one long whistle to the steamer Victory coming up. The Victory answered with two. The Plymothian, a little while afterwards, blew one more, which was answered by two, and the Plymothian blew three whistles and must have went back on his engines because her stern sheered to the westward, and that's all I know."

On page 390 he repeats this substantially and also admits hearing the danger whistles of the Victory.

Harrison, engineer of the Pioneer (page 394):

"As she got abreast she saluted the Pioneer with three whistles. That called my attention * * and a few minutes after that Captain Clark ran back and said, there is going to be a collision, and I said, why, and he said, because they blew cross whistles, and about that time the Plymothian blew one whistle (I didn't hear the first one) and the Victory answered with two, and a few minutes after that the loaded steamer Plymothian blew three whistles."

On page 395, in speaking of the whistles saluting the Pioneer, he says:

"When they blew the salute whistle *the first wasn't very loud*, but the other was distinct enough. *I suppose it was full of water or something*, but when she blew the pass whistles they was. Q. The pass whistles? A. Signal whistles. Q. They were clear? A. Yes, sir, clear and distinct. As to the first she blew, the three to the Pioneer, *the first wasn't so loud because the pipe was full of water.*"

Joseph M. Clark (page 400):

"We were below No. 9 buoy when the Plymothian came out from the wharf, and when she got abreast of me just below the buoy she blew three whistles to me and I answered the salute, and I didn't pay any attention then until she passed by, I suppose, 100 yards, and then he blew one whistle and I looked around out of the pilot house door to see what he was blowing at. I knew the Victory was coming up because I was waiting for her, and the Victory answered with two. I could see the whistles from the pilot house * * and shortly after that the Plymothian blew one again, a long whistle, and that was answered with two from the Victory * * and shortly after that there were three alarm whistles given by the Plymothian."

Wynne, p. 404. This man was really nearly two miles off, but appears to have had supernatural sight and hearing:

"I saw the Plymothian when she first left the coal dock, and the Victory, when she left, was then coming up below Craney Island light-house. The Plymothian sounded her one long blast of the whistle and waited, I suppose, an interval, as near as I can remember, about two or three minutes, which the Victory answered with two blasts of her steam whistle, and the Plymothian waited again about the same length of time and blew her another blast of the whistle, and the Victory answered with two, the same, and then the Victory was coming up with a strong flood-tide a pretty good gait, and the Victory blew her three or four blasts, what we call the danger signal, and the Plymothian answered them pretty close together."

Again, on page 406, in answer to a question from the cargo counsel, he repeats his statement that the Victory blew the danger signals first, but further on in his deposi-

tion a sudden light seemed to break upon him, and he took that back and said that the Plymothian blew the first danger signals.

As to the weakness of the Plymothian's whistle, the testimony of the Victory finds striking confirmation in that of Harrison, who says that the three whistles to the Pioneer were blown just as the Plymothian was abreast of No. 9 buoy, and that the first of those whistles was full of water and steam and very indistinct. Hence, to a vessel coming up the river, that whistle to the Pioneer may well have been mistaken for a response of two whistles. And Harrison in this respect negatives the testimony of Mardon and Henley that those whistles were all clear and distinct and that they had blown out their whistle before starting.

It must be remembered that there were a lot of tugs whistling around Lambert's Point, and also locomotives on the pier. This may account for the failure of the Victory's men to hear the Plymothian whistles if they were in any degree faint, and it may also be that Wynne, who was in Tanner's creek, mistook some of those whistles for whistles from the Plymothian.

The preponderance of testimony does not show that the Plymothian blew the first signal. It may show that the first signal which the disinterested witnesses heard came from the Plymothian, but that is quite another proposition. The proof in the case is that English steamers have whistles very inferior to American. These disinterested witnesses, with the exception of Wynne, were all immediately around the Plymothian as she passed buoy 9, and at that time the Victory was a mile off. They were not particularly interested in listening for signals, and it is entirely conceivable that the Victory may have blown a signal which they did not hear on account of its distance. When the Plymothian blew, however, she being right by them, it would attract their attention, and

then the second signal of the Victory, having had their attention attracted, would probably appear to them as the first that really came from the Victory. The testimony of the navigators of the Plymothian on this point is at issue with their own witnesses. They did not hear even the first whistles of the Victory, which a dozen disinterested witnesses around heard. They pretend that they blew three separate whistles from the Plymothian, when their own witnesses show that they blew only two. The conflict between them and their own witnesses is really very much greater than between the Victory evidence and their own witnesses; for as they and their own witnesses were in the same neighborhood, they ought to have been expected to hear in the same way and to hear the same thing.

The counsel for the Plymothian in their petition for a certiorari repeatedly state that both the District Court and the Appellate Court found as a fact, that the Plymothian gave the first signals and the Victory crossed them. In this they are mistaken. The Appellate Court on the contrary seems to hold that the Victory signalled first and that the Plymothian failed to respond. Thus:

"The Victory being in a comparatively narrow but deep channel, up which she was proceeding in full view of the Plymothian coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the Plymothian to respond to her signals, thus making a collision inevitable." (R., 500.)

They seemed to think, however, that the failure of a steamer to answer the signal of another steamer is a mere peccadillo, "an act of omission."

COMPARATIVE SPEED.

The testimony of the Victory is that the Victory slowed

down at Craney Island, and that they reversed some time before the collision.

The testimony of Lyons, the Plymothian's helmsman (p. 211), is that the Victory was coming at pretty good speed. Baird also says (p. 232) that the Victory was making decided speed at the collision. Wood (page 240) thinks she was going 5 knots at the collision. Mardon (page 266) thinks she was making 4 knots at the collision, and in the same breath that she came full speed till 300 yards off (p. 265). Brown, the Craney Island light-house keeper (p. 346), thinks that she passed Craney Island at the rate of 12 knots an hour, and kept it up; but their witness, Harney, who claims to have seen her at the same place, contradicts Mardon and Brown, and says she was going but five knots (R., 433).

The collision happened at buoy 7. Measurement will show that to be about 3,000 feet from the light-house, and yet Brown, without the aid of a glass, stood on that little squatty light-house and actually saw the propeller of the Victory as a small portion of its blade kicked out of the water. He proves, however, that the Victory did reverse, as he saw pieces of the blade when it did commence to back (R., 352).

Etheridge thinks that the Victory was moving eight or ten miles per hour, and that at collision she was moving five miles per hour (R., 355).

Henley (R., 362) thinks the Victory was going four knots at the collision.

Goodwin thinks the Victory, when he first saw her, was moving ten miles an hour (R., 375). However, he saw the Victory slacken speed (R., 384).

Joseph M. Clark (R. 402), says he doesn't think the Victory had much headway at the collision.

Wynne, the veteran mariner of Tanner's creek, says that the Victory was moving eight or ten miles an hour; that her headway was not checked at all until the collision

(R., 405). Herein he not only differs from Goodwin and Clark, who say that her headway was checked materially, but even from the crew of the Plymothian, who claim that she was going fast, but that at the collision she was only going from four to five knots an hour.

The witnesses for the Plymothian estimate her speed at from four to five knots an hour against the tide, which would mean at least seven knots through the water.

In considering this question of speed it is important to bear in mind that the tide made a difference of at least two miles an hour to each vessel, or four miles an hour in all.

In the case of *The Galatea*, 92 U. S., 439, it was decided:

"Where, in order to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that when one should stop it is the duty of the one proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel."

"It is a comparatively easy matter for a ship steaming against a two-knot current to come to a dead halt without stopping her engines and without losing her steerage way. But a ship descending with the current cannot, by stopping her engines and without reversing, reduce her speed below two knots an hour; and when her speed is reduced to that limit she drifts, and her helm practically loses all control over her movements. These considerations afford an obvious reason for requiring that, in the circumstances to which the first part of the rule refers, the ascending shall give way to the descending vessel. In their Lordships' opinion, that part of the rule becomes imperative whenever an ascending ship approaching 'a point which does not afford sufficient breadth' has notice that if she proceeds she will be exposed to the risk of meeting a descending ship at or near that point. The second part of the rule is not, in their opinion, meant to come into operation, except in cases where the ascending ship has reached the point of danger and has actually begun to navigate the contracted passage

before any such notice was conveyed to her." *The Diana* (1894), A. C., 629.

Hence under this rule it was incumbent upon the Plymothian to stop in a shorter space than the Victory could stop in, and yet the preponderance even of her own testimony shows that she was not entirely stopped at the moment of collision. It is true that some of her witnesses claim that she was actually moving backwards, but a critical examination of their own testimony will show that she must have had some headway at the time of collision. One of her witnesses goes so far as to claim that the boat commenced to back the very instant that the engines commenced to back; but this shows the absurdity of their testimony on that subject.

Her wheelsman, Lyons, (R., 211) expressly says that he couldn't say whether she was making sternway, but that she was making no headway.

Hendema, her other helmsman, says, at page 226, that she might have been going a little ahead at the collision, but he couldn't say how fast, and on page 230 he again says in answer to a question of his own counsel:

"Q. Was she going ahead or not? A. Yes, sir, going ahead. Q. You think she was making a little headway at the time of collision? A. Yes, sir."

Baird, page 232, only claims that she was still at the time of collision.

Wood, page 239, says practically the same.

Mardon, her master—page 265–267—says that her headway was entirely checked and that she *may* have been making a little sternway.

Etheridge (R., 355) thinks that she was going back, certainly not forward.

Henley, her pilot, (R., 362) only claims that he had no headway, but does not claim any sternway.

Goodwin (R., 374-5) says that she was lying perfectly still at the collision, but does not claim any sternway.

John I. Clark (R., 388) says:

"Q. Did you notice the headway of the Plymothian at the time of the collision? Was she going ahead? A. I don't think the Plymothian was going ahead but very little, if any—not much."

Harrison (R., 395) thinks that she wasn't going ahead at all, but does not claim any sternway.

Joseph M. Clark (R., 402) says:

"Q. She was making very little headway at the time? A. Yes, sir."

Wynne, the long ranged Tanner's creek pilot, (R., 405) says:

"I wasn't close enough to see, but as far as I could see her headway was checked."

When two vessels are approaching each other, just as when two railroad trains are passing each other, the question of which is moving ahead and which is moving faster is a very uncertain one. Witnesses looking at it unconsciously transfer the speed of one to the other, and such testimony is very unreliable.

The best proof on this subject is circumstantial evidence, and can be gathered from the appearance of the injuries inflicted. This proof in this case shows that it was the Victory which was stopped and that it was the Plymothian which did the damage by forging across her stem. The stem of the Victory itself was not crushed in, and yet just behind the stem there was a large hole in the starboard bow of the Victory opening inwards, and right opposite, a large bulge on the port bow, pressed outwards, and a large piece of iron from the Plymothian lodged up against this bulge.

This is conclusive that the force exerted was a force

from the west to the east at right angles to the Victory, and not a force from the Victory forward.

If a bullet is found embedded in the side of a thick plank, leaving a plain hole where it entered, and causing the plank to bulge or splinter where it lodges on the opposite side, the natural inference would be that the bullet had penetrated the plank, and not that the plank had fallen against the bullet.

The pleadings of the Plymothian themselves only claim that "her headway was entirely checked at the time of collision." The fact that the Victory had some headway on her, if she had any, was excusable, because she had the tide behind her. The fact that the Plymothian had headway is inexcusable, because she had the tide dead against her, had, according to her own testimony, just started and gotten up no speed, and hence ought to have been able almost to have stopped in her tracks with the assistance of the tide, if her engines had been reversed for one-fourth or one-eighth of the time that her fabricated log falsely claims.

THE VICTORY'S COURSE.

Here the evidence of the witnesses on behalf of the Victory is concordant that she was coming up along the eastern side, and kept practically on that course until the change made to avoid the collision. Those of the Victory's crew who profess to know anything about it, all testify to this, and also the disinterested witnesses, Pratt, Page and Martin. On the other hand, it is impossible to judge what the theory of the Plymothian's side is on this question for their evidence is discordant.

The first paper on their part which touches this question is the answer to the Victory libel, and this states that the Victory kept up the centre of the channel until her helm was put hard-a-starboard. This same statement is repeated in the answer to the cargo libel made by the Ply-

mothian, in the petition of the Plymothian for limitation of liability, and in the petition of the Plymothian filed in the Victory proceedings for limited liability; hence the pleadings positively commit them to the statement that the Victory kept a practically straight and unchanged course right up the centre of the channel until just before the collision; but when we come to analyze their evidence we find it in charming inconsistency with their pleadings and the different witnesses with each other.

Their first outside witness was Brown, the Craney Island light-house keeper. He testifies that the Victory passed Craney Island light as close to the western bank as she could get without going aground, and kept this course for half a mile (R., 346, 348–9).

Their next witness, Etheridge, testifies that the Victory was as near mid-channel as she could get (R., 354).

Their next outside witness, Goodwin, testifies that the Victory was on the west side of the channel at Craney Island, but testifies also that she never ported (therein, flatly contradicting pilot Henley), but kept a straight course until she starboarded (R., 375, 377).

Their next disinterested witness, Harrison, testifies that the Victory was near mid-channel (R., 399).

On the other hand, Schroder, of their crew, testifies that the Plymothian was going down close on the starboard side of the channel, and that the Victory was dead ahead (R., 203).

If the Plymothian was on the starboard side and the Victory was dead ahead, the Victory must have been on the starboard or eastern side, too. They cannot possibly put the Plymothian on the starboard side and the Victory in mid-channel, or the west side, and get them dead ahead.

Their captain, Mardon, testified that the Victory was near mid-channel at Craney Island, and kept that course (R., 264, 270–1). There is one remarkable statement

made by Mardon in this connection which demonstrates either that the Victory was on the starboard side, as we contend, or that the Plymothian was in mid-channel.

He says that at the collision moment each of the two vessels had changed her course two or three points. If this is so, then each must have been equi-distant from the bank, and one of his other statements must have been untrue. Either the Plymothian was in mid-channel or the Victory was on the east. In fact, this will show that the Plymothian must, if anything, have been furthest west than the Victory, for she was moving against the tide and was a shorter ship, and therefore would turn quicker than the Victory (Goodwin, R., 382).

But it was reserved for Henley to cap the climax on this subject. He testifies that the Victory was in mid-channel at Craney Island light (R., 364); but he also testifies that after his second whistle the Victory ported so much as even to show him the round of her stern (R., 361). As he had previously testified that the Victory was about at Craney Island light when he blew his first whistle, this testimony, if true, would show that this supposed porting must have taken place after she passed Craney Island light, and yet Goodwin, one of his witnesses, swears positively that the Victory never ported after passing Craney Island light, and swears this not only positively, but repeatedly. And Henley's companion, Mardon, saw nothing of this supposed porting.

This pretense of Henley's, in order to make out a case of port and port, is inconsistent with all the rest of his evidence. The fact is, that the natural conformation of the channel required the Victory, even without leaving the centre of the channel, to port a little about off the red buoy just below Craney Island light, and Henley attempted to turn this porting to account, although this porting must have happened, according to his own testimony, before he

blew his first whistle, and not after he blew his second, as he pretends, and his deposition practically admits this (R., 364).

Hence, we may argue that the preponderance even of the Plymothian's witnesses themselves, shows that the Victory was at no time west of the mid-channel line, and there is much even in that testimony to show that she must have been on the eastern side, as claimed by us.

THE PLYMOTHIAN'S COURSE.

The evidence of the Victory shows that the Plymothian had gotten over in the western part, thus making a case of starboard to starboard. The probabilities, at least, are in favor of this hypothesis. The Plymothian was lying on the north side of the north pier at Lambert's Point. North of her was a breakwater, which, Mardon says, neutralized the effect of the tide until the vessel had passed beyond it. We may assume also that the tide is the swiftest in the deep water channel and gradually gets swifter as you approach it, although it has some current even over the flats. The Plymothian was 260 feet long. She started out from the north side of the pier under helm slightly aport, according to her master. Hence the bow would feel the effect of the tide before the stern, which, on account of the wharf, could not be swept up, hence the first effect of the tide, until the bow had reached a point 260 feet in the channel, at which time the stern would have just cleared the wharf, would be to sweep the bow up stream and to necessitate a long reach in turning. In addition, the bow being nearer the deep water than the stern by 300 feet, would constantly feel the current strongest, and hence it is a matter of common knowledge and common sense that a vessel which had not gotten up her headway and had a two-knot current on her broadside could not possibly

turn sharp around Buoy 9. She must have taken some time to turn.

It is also observable by a glance at the chart that the line of the channel, after passing buoy 9, is a little westerly of north, and does not proceed straight to buoy No. 7. Between the two buoys there is a lump or bulge. Hence, if the Plymothian, after straightening her course down the middle of the river, was anywhere near mid-channel, and if the Victory was then about mid-channel just south of Craney Island light, the two vessels would present their starboard bows to each other. If the Victory was on the east side of the channel, there would be quite an angle between the two vessels, each being on the starboard bow of the other; hence even if the Plymothian was not on the western side of the channel, but was at any time in her swinging near mid-channel, as she must have been, with that tide, she would have been on our starboard bow, and would have justified our giving her two whistles and holding our course.

The natural facts, therefore, would show that the Plymothian could not have hugged the east bank as she claims, but must have gotten at least as far as mid-channel.

Here, too, the testimony of the Plymothian is in hopeless conflict. The statement in his pleadings, commencing with the answer to the Victory libel is (See paragraph 7):

"That in the due prosecution of her voyage she passed close to the westward of buoy No. 9 under a port helm, *it having been previously put hard-a-port.*" (R., 442.)

This answer was the first paper filed by them and was sworn to by Allen Mardon, master. The statement in his answer to the cargo libel is *verbatim* the same. Allen Mardon swears to this also. These two papers were filed before their evidence was taken.

The next paper filed is their petition for a limited liability. When that was filed their evidence had been taken.

It merely states that they passed buoy 9 under a port helm, but says nothing about the previous hard-a-port. (R., 8.)

Their next paper was their answer to the Victory petition for limitation of liability, and is like the last. (R., 11.)

Coming to their depositions, their first witness, Ham, who professes to know anything about this, says that when they went out they went straight out from the pier across, and he testifies positively that the order given on the Plymothian just before the collision was port and not hard-a-port, and that hard-a-port was not ordered until after they struck. (R., 189, 194.)

The next witness, Schroder, says that the Plymothian was under a port helm when the danger signals were given—that is, she had ported even previously to the danger signals. (R., 203.)

Their next witness, Lyons, testifies that they left the wharf under port helm, but when they got out *in the middle a way*, it was to hard port, then the helm was steadied, then the helm was put to port again and then the order came hard-a-port, which was continued to the collision. (R., 209.)

This shows that even before the hard porting their ship was under a port helm.

Again, Lyons says that this order to port was given just after the first whistle, which, according to the preponderance of their own testimony, was blown about even with buoy 9. (R., 215.)

The next witness, Hendema, testifies that they left the wharf under a port helm; that after they got some distance it was hard ported; that he heard some whistles and steadied; that then he ported, and then hard ported. He is in conflict with the first helmsman, but he, too, shows the vessel was under a port helm before he hard ported, which was given professedly to avoid collision (R., 219).

Their next witness, Wood, says that they went out with

the helm hard-a-port until they got around the buoy, and he knows this because he looked at the helm. He says immediately afterwards that they steadied, and then again says it looked to him all the way hard ported (R., 247, 250).

Mardon says that they left the wharf with helm a-port; that when they got close to buoy 9 they put it hard-a-port, and passed that buoy in 20 or 30 feet; that when they straightened down the river the helm was steadied, but he doesn't say how long it was steadied and does not mention the porting which his helmsmen both mentioned. On the contrary, he dodges that question as follows:

"Q. And under helm amidships? A. The helm was working as required."

And he dodges it again when speaking of the time when he blew his three whistles, he says:

"Q. In the meantime how had your helm been put? A. The helm had been put hard-a-starboard. Q. Had it been changed from steady before that? A. We had been steering down the eastern side of the channel until I saw a collision was likely, and then we put it hard-a-port when we saw him come up on a starboard helm."

And further on, he says that when the whistles were blown the helm was ported a little while, and then when the last whistles were blown and the engines reversed it was hard ported.

Henley, however, says that they left the dock with helm a little to port, then put it hard-a-port, then straightened (R., 360).

Of their disinterested witnesses, Etheridge says that they left the pier under a port helm, but Goodwin says that he followed the Plymothian right out behind her, where he was in the best position to see her helm, and that she left under helm hard-a-port (R., 353, 377, 381).

John I. Clark, who was on the pier, and also in position to see her as she went out, says that her helm was hard-a-port. (R., 391.)

The above summary shows that their evidence is in irreconcilable conflict as to the helm under which they left the wharf, but we may assume from their own evidence that the Plymothian, after passing buoy 9, was moving under helm partly a-port until she gave her danger signals, at which time she put it hard-a-port.

Now, bear this in mind in connection with the statement of her navigators, that she was proceeding down within 30 or 40 feet of the eastern buoy line. Measurement of the chart shows that from buoy 9 to buoy 7 is about 2,300 feet, or nearly half a mile, and yet they come seriously into court and ask us to believe that they started within 40 to 60 feet of the eastern channel line and moved that way for half a mile with helm a-port, and did not run aground!

A vessel proceeding against the tide, especially one only 260 feet long, obeys her helm very quickly, and if the Plymothian was, as her master contends, within forty to sixty feet of the bank, and moving under helm always practically a-port, she would have gone outside of the buoy line in fifty yards.

They admit that the collision occurred near buoy No. 7, with the buoy on their starboard bow, and that it never got on their port side until after the collision; hence, whether they were to the west of buoy 9 or to the north of it, they at least were not to the east of it. How could they have proceeded for that distance under a port helm and have kept always to the westward of buoy No. 9?

What is the explanation of this testimony, if true? A vessel bound north when under port helm necessarily moves from west to east; hence, if the collision occurred with buoy 7 on their starboard bow, after they had been slightly under port for some distance and hard-a-port for four minutes, according to their estimate, they must have been on the western side of the channel when they started that movement. They must have been well over to the western

side of the channel when they commenced their porting; and this confirms the natural facts of the case, when we consider that in coming out the tide must have swept them well across the river, and it also confirms the testimony of the Victory's crew and of the men from the Princess.

Their own disinterested testimony does not bear them out in their statement. It is true that some of them make her pass very near to buoy 9, and the likelihood is that she did in going out leave buoy 9 very close to the north of her; but it is impossible to suppose she ran for buoy 9 and then swung sharp around, like a buggy around a street corner, and passed within the same distance, leaving the buoy to the east. If they passed buoy 9 close to the north of her they must have swung out at least her own length in the channel, which is 250 feet. Some of her own witnesses placed her as far out as mid-channel; and when they get her out in mid-channel, as she goes out swinging into mid-channel, and the Victory is coming up heading for buoy 9, a glance at the map will show that they presented starboard to starboard and created the situation calling for two whistles. If she steers as other ships, she must have gone out at least as far as this, and then having gotten out this far she should have kept down on that side of the channel, especially when she saw another steamer coming up on the course which the Victory was pursuing; which was a proper manœuvre in the Victory under such circumstances, seeing a vessel coming out from Lambert's Point which he knew had to move out into the channel a distance of 350 yards at least from Lambert's Point to buoy 9, and which he knew had to have some space to swing around. The Victory under such circumstances should have steered for buoy 9 along the eastern side, giving the entire western side of the channel to the Plymothian in which to have turned around, and to have proceeded about her business. Had he gone over to the west side, not knowing exactly

what kind of a vessel the Plymothian was, nor how she steered, he would have embarrassed her in her swinging.

SUMMARY ON THE FACTS.

1. The Victory was not in fault in taking the eastern side of the channel.

The lower courts in this respect held her to violate a rule which is not in existence.

2. The Victory was not in fault on the score of whistles. Although the District Court held on the facts that the Plymothian gave the first signals, the Circuit Court of Appeals seemed to think otherwise, and neither court blamed her on this score.

3. She was not in fault for her handling of the engines. She had slowed down about when passing Craney Island, and she stopped and reversed as soon as the eccentric movement of the Plymothian showed the necessity for it.

4. She was not in fault for giving two whistles, for if they bore on each other's starboard bows, the port-helm rule did not apply. The District Court held that the port-helm rule did not apply; the Appellate Court confused it with the starboard-hand rule.

5. The Plymothian was in fault for having an inefficient lookout, who did not hear whistles from the Victory that mere casual observers heard, and did not see the schooner in front of her until the last moment.

6. Under the decision of the Circuit Court of Appeals holding that the Victory signalled first, the Plymothian was at fault for crossing the signal, despite the fact that it was "an act of omission."

7. The Plymothian was in fault in not backing earlier (Beryl, L. R., 9 P. D. 137).

If these positions are true, the Victory was blameless, and the Plymothian was solely responsible. At the worst, the fault of the Plymothian was as great as that of the Vic-

tory, and the latter did not deserve the harsh adjectives in the opinion of the Circuit Court of Appeals based upon a misconception of the law.

THE HALF-DAMAGE RULE.

But even if the Victory was much more to blame than the Plymothian, there is no warrant of law for the action of the Circuit Court of Appeals in confiscating the Victory's bond and holding the Plymothian only for the excess.

The counsel for the Plymothian argue that the effect of this decision was to place a much greater burden on her than the Circuit Court of Appeals intended, and they proceed to figure their loss as almost equal to the Victory (Plymothian petition, p. 16). They arrive at this result by taking into account the damages to the Plymothian, but not taking into account the damages to the Victory. An easy calculation will show that the result makes a difference of $10,000 in round numbers, to the Victory—in other words, the Circuit Court of Appeals, in a case where both vessels were to blame, and where, under the universal practice of this court, the regular form of decree is a decree for half-damages against each, with a mere remedy over in case of deficiency, has made the innocent owners of the Victory pay about $10,000 for which the owners of the Plymothian were responsible and for which there was an ample bond on file. Even if the rule of half-damage is applied, the Victory having the greater value, will have to pay a larger amount than the Plymothian. This result ought to be inequitable enough, if there is anything in the maxim that "equality is equity" without taking all and thereby benefiting the other vessel to that extent.

The decision of the Court of Appeals laying down this novel doctrine was rendered without the advantage of previous argument. It was a question not involved in the lower court. Not an assignment of error by either of the

parties litigant raised it. The most enthusiastic dreams of their advocates never once prompted the insertion of a line on the subject in the briefs. The first that anyone knew that such a departure was contemplated was the filing of the opinion; and when petitions for rehearing were filed asking an opportunity to discuss the question, they were not granted. It has not given satisfaction even to the owners of the Plymothian, the ones most immediately benefited by it. In their brief filed with their petition for a certiorari in this court, pages 2 and 3, they argue that the rule of an equal division of damages is well settled, and that the action of the court in this respect was an error.

We may assume that their position will be the same on final argument. They will hardly ask a certiorari on the ground that the lower court erred in this respect and then, when the certiorari is granted, argue that the lower court was right.

As far as the shippers are concerned, they have no interest in the matter. If they get all of their damages, it is immaterial to them who pays them. It is somewhat embarrassing, therefore, to know who our antagonist is on this point, but as it has been decided by a court which on admiralty questions is a court of last resort, we cannot ignore it.

In the opinion (R., 504) it is admitted that the general rule, almost universal, is to divide the loss equally; but the court goes on to say that this rule is not inflexible; and to sustain this proposition, it cites the *Max Morris* decision, 137 U. S., 1, and it then goes on to speak of the application of an equal division of damages as *rusticum jus.* (R., 504.)

The best discussion of this question as an abstract proposition is found in chapter 6, p. 125, of Marsden's work on collision. He reviews the old sea laws on the subject and the history of the decisions in England. It can hardly be

considered a profitable task to go through these old sea laws. They were as primitive as the vessels which operated under them.

It will appear from this review that the rule of division of damages originated in cases of inevitable accident, not in cases where there was mutual fault, and in many it applied also to the cargo. (4 Black Bk. Adm. 283-4, 435.) If they are to be followed, why has not this court followed them in those cases instead of deciding, as it has often decided, that in cases of inevitable accident or where the loss is inscrutable, it rests where it falls? It was to this class of cases, holding vessels and even cargoes responsible to outsiders for accidents which they could not prevent, that the term *rusticum jus* was originally applied. It is to this class of cases, in part, that the term is applied by *Chancellor Kent* in the citation. To such class of cases it was well applied.

But, if it is a *rusticum jus* to divide damages equally and thereby have at least some settled rule, what Latin is strong enough to characterize the judgments which would be rendered if all the various judges in the world who have admiralty jurisdiction were allowed to divide damages according to their idea of the degree of fault? Such a loose system would certainly put us at sea.

There is no warrant in the decisions of this court for the assertion that the rule of equal division is not inflexible. There is none in the *Max Morris case*, the only decision which they cited. It came as far from deciding any such proposition, as the *Britannia case*, cited in a previous part of their opinion to support the doctrine that the International Rules governed in local waters, came from that proposition. The *Max Morris case* was not a collision case at all. It was an action for personal injuries The question at issue in the case was whether the common law rule of contributory negligence applied, and this court in deciding the case as it did, not only expressly placed it upon the

ground that it was not a collision case, but in the conclusion of its opinion even said that as to personal injury cases the question whether to divide the damages equally or in any other proportion, was one which they expressly reserved. In other words, that case merely decided that a man injured upon a vessel could recover some damages, even though himself in fault, and expressly refrained from deciding how to estimate them; and possibly when this decision is cited for such a proposition as an unequal division of damages in a collision case, the astonishment must have been very similar to that described by Bynkershoek on a certain occasion when he attempted to persuade the Supreme Court of the Netherlands, of which he was a member, to divide the loss in such a case proportionate to fault and not equally. He describes their reception of his proposition as follows:

Memini, me senatore et de geometrica proportione perorante, reliquos senatores obstupuisse atque si Jovis ignibus icti essent.

It is agreed that the first case in this court which passed upon this question was that of the schooner *Catherine*, 17 How., 170. If an examination of the decisions of this court will show that this rule has been treated as the settled, inflexible rule, and not as a mere rule of convenience, then it is quite useless to look into ancient codes or personal injury cases.

The cases in this court where the damages have been equally divided are too numerous to review. Most of them are collated in the *Max Morris* decision. In most of them the court has simply divided the loss equally without comment, treating it as a matter of course. The only cases, however, in which they have discussed the rule, have stated it as inflexible and not as elastic.

"If both vessels were in fault, then the damages, *under the rule applied in this court, must* be proportioned between the offending vessels."

The Morning Light, 2 Wall. at p. 557.

"Even flagrant fault committed by one of two vessels approaching each other from opposite directions, does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent collision.

"Damages equally divided in a case of collision on an application of this rule."

The Maria Martin, 12 Wall. at p. 31.

"If both vessels are in fault then the damages *must be* equally proportioned between the offending vessels."

The Continental, 14 Wall. at p. 355.

"In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.

"It is not intended to say that the principles which determine the existence of mutual fault in which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

Atlee vs. Packet Co., 21 Wall. pp. 365-6.

The Sunnyside, 91 U. S., at p. 216.

"Tested by these several considerations the court here is of the opinion that both vessels were in fault and that the damages and the costs in both of the courts below should be equally proportioned between the two vessels *as prescribed by the decisions of this court.*"

The America, 92 U. S., at p. 438.

"Disasters of the kind occur from different causes and

under very different circumstances, and the rules of admiralty law applicable in the determination of such controversies vary to meet the varying circumstances which give rise to the accident. Judicial experience has given no better guide than that furnished by Lord Stowell, than whom no abler judge ever presided over the admiralty court of the parent country. Speaking of such disasters, he remarked to the effect that there were four possibilities under which an accident of the kind may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to fall, the rule being that the party not injured is not responsible to the losing party in any degree. Secondly, a misfortune of the kind may arise when both parties are to blame; as where it appears there has been a want of due diligence or of skill on both sides; and he adds that in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by both. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, he remarks, that it may happen from the fault of the ship which ran the other down; and in that case the injured party is entitled to an entire compensation from the other. *The Woodrop*, 2 Dodson, 85.

Freedom from fault is a good defence in a cause of collision against a claim for damage promoted by an injured party, and it entitles the promoter of such a suit to full compensation from the opposite party, if proved to be guilty. Where neither party is in fault, and the damage was the result of unavoidable accident, the rule that the loss must be borne by the party on whom it fell, is one of universal application. *The Shannon*, 1 W. Rob., 470; *The Itinerant*, 2 id. 243; *The Locklibo*, 3 id. 318; *The Morning Light*, 2 Wall. 560.

Under the second of the foregoing rules, when both vessels are in fault,—the sums representing the damages are added together, and the amount is equally divided between the parties; and that rule prevails in all cases where there is mutual fault, even though one of the vessels may

have been much more in fault than the other. Fault being imputed to both vessels, and the charge being proved, the inquiry which was most to blame is immaterial, as the damages must be divided between the two, according to the rule provided in the admiralty courts. *Vaux vs. Sheffer*, 8 Moore P. C. C., 87.

Attempt was made in the Court of Sessions in Scotland to establish an exception to that rule; and the court finding, in a case where both vessels were in fault, that the greater share of the blame rested on one, decided that the owners were liable for two-thirds of the damage. Maude & P. on Ship., (3rd ed.) 470; *LeNeve vs. Shipping Co.*, 1 Shaw's Cas., 378.

Prompt appeal was taken from that decree to the House of Lords, where the decree was reversed, upon the ground that the true rule was the one laid down by Lord Stowell, that, where a misfortune of the kind happens from the want of due diligence or skill on both sides, the loss must be apportioned between them, as having been occasioned by the fault of both. *Hay vs. LeNeve*, 2 Shaw's H. of L. Cas., 400; *The Washington*, 5 Jur. 1067.

Both vessels being in fault, the positive rule of the court of admiralty, says Lord Denman, requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. *DeVaux vs. Salvador*, 4 Ad. & El. 431.

Innocent parties in cases of the kind are entitled to full compensation, but the admiralty rule as between wrong-doers is that the combined amount of the damage shall be divided between the owners of the two offending vessels. Text-writers of standard authority, as well as courts, have adopted the same rule, and hold that, where both vessels are in fault, the loss must be apportioned between them, as having been occasioned by the fault of both. Maclachlan on Ship. (2d ed.), 286; 1 Pars. on Ship., 527; Williams & Bruce, Prac., 71.

All of these writers, and many others, lay down the rule, that, where both parties are to blame, the loss must be apportioned between them; and the authors last cited say that the rule is founded upon the principle which, from ancient times, has been applied in the admiralty court, that damage

by a common fault shall be considered as a common loss. *The Lima*, 4 Jur. N. S., 147; *The Aurora*, Lush. Adm., 329.

Strict justice would require, said Dr. Lushington, that the burden of making good the loss should fall upon the two delinquents in proportion to their delinquency, but in practice the proportion is impossible to be ascertained. Such a rule, if adopted, would be utterly impracticable, for the reason that the court cannot apportion the loss according to the *quantum* of neglect or culpability on the one side or the other; hence equal apportionment is the universal rule where there is mutual fault, even though the fault on one side may be much greater than the fault on the other. *The Milan*, Lush. Adm., 401; *The Linda*, 4 Jur. N. S., 147."

The Atlas, 93 U. S., 312-14.

"Both vessels having been in fault, *the settled rule* in this court is that the damages must be divided."

The Stephen Morgan, 94 U. S., at p. 604.

"The rule of admiralty in collision cases, as we understand it, is, that, where both vessels are in fault, they must bear the damage in equal parts—the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses ascertained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case the duty of payment fell upon the 'North Star,' the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule.

The contrary view is based on the idea that, theoretically, (supposing both vessels in fault) the owners of the one are liable to the owners of the other for one-half of the damages sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one-half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. On

the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or (as in some authorities), it is spoken of as a case of average. Thus, Lord Stowell says: 'A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or of skill on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.' *Woodrop-Sims*, 2 Dods., 83. This statement of law was adopted in the text of Abbott on Shipping pt. iii. c. 1, sect. 2. It is also adopted by Mr. Bell in his Commentaries on the Laws of Scotland, vol. i., 580, 581, who remarks: 'By the maritime law this is a case of average law or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss.' It is also adopted in the latter text-writers. See Maclachlan on Merchant Shipping, 274. In Hopkins on Average, p. 189, it is stated thus: 'If, as the result of cross-actions in admiralty, both vessels be found in fault the rule of the court is, to add the damages, losses, and the costs of the two ships together, and to divide the joint sum, in moieties, and decree each vessel to bear an equal portion.'

If we go back to the text of the law, in the Rules of Oleron, following in the laws of Wisbuy and other laws, we find it expressed in substantially the same manner. The case is supposed of a ship coming into port negligently managed, and striking a vessel at anchor in an improper position, so that both are in fault and both are damaged. The Rule says: 'The damage ought to be appraised and divided half and half between the two ships, and the wines that are in the two ships ought to divide the damages between the merchants'. 1 Pardessus, Collection de Lois Maritime, 334; Cleirac, Us et Coutume de la Mer, 55; Sea Laws, 141; 1 Peter's Admiralty Decisions, App. xxiii.

In Jacobsen's Laws of the Sea it is said: 'If the damage is done reciprocally, such damage is apportioned in common between the parties'. The French Ordinance of 1681 expresses the rule in exactly the same way: 'The damage shall be paid equally by the ships which have caused it and suffered it.'

Valin, 1, iii; tit. vii, art. 10. On this Valin remarks: 'Whenever damage by collision is adjudged common average between two ships, the decree is that the costs of suit and the appraisement of the damage shall be equally borne in common, to effect which they are made into one mass, with a calculation of the average'. Emerigon, who had great experience as an admiralty lawyer and judge, says, upon the same article: 'The damages sustained by both ships are appraised and made into one mass, which is equally divided'. Assurances, c. 12, sect. 14, par. 3. Boulay-Paty, commenting on the Code de Comerce, art. 407, which relates to the same subject, says: 'We conclude, then, that, after due regard is had to the character of the damaged parts of each ship, the injury and damage which they have sustained and the appraisal thereof, being added together in a single mass, must be divided so as to be equally borne by each of the ships which have been struck'. Droit Commercial, vol. iv, 497.

In this country the same mode of expressing the law has always prevailed. The first case in which the question came before this court was that of *The Catharine vs. Dickinson*, 17 How., 170, in which both vessels were adjudged to have been in fault; and the Court, by Justice Nelson, adopted the admiralty rule as it had been administered in the District and Circuit Courts. Justice Nelson said: 'The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the District and Circuit Courts,we understand, has been to divide the loss'; and he cited the case of *The Rival*, decided by Judge Sprague (Sprague's decisions, 160), and the leading English decisions on the subject. Subsequent decisions have invariably used the same language. *Owners of the James Gray vs. Owners of the John Frazer*, 21 How., 184; *the Washington and the Gregory*, 9 Wall., 513; *the Sapphire*, 11 id., 164; S. C. 18, id., 51, 56; *the Alabama and the Game Cock*, 92 U. S., 695; *the Atlas*, 93 id., 302, 313; 3 Kent, Com. 231".

The North Star, 106 U. S., 20, 22.

Even as late as *the Beaconsfield*, 158 U. S., 303, this rule is assumed as settled.

It is, therefore, submitted that whatever the rule may be as to personal injury cases, it is inflexible as to collision cases, and cannot be changed except by a judicial somersault which will unsettle a doctrine as firmly settled as any in the law.

It is usually considered sufficient to cite one decision of this court in settlement of a proposition. We are fortunate in this case in being able to cite a score.

Nothing short of judicial legislation can change the rule, and this court in its recent opinion on the Anti-Trust act has given in emphatic terms its present opinion on judicial legislation.

THE PROVISIONS OF THE PLYMOTHIAN'S BILLS OF LADING AS AFFECTING THE VICTORY.

Some of the bills of lading of the Plymothian contained the negligence clause and also the flag clause. A question between the Plymothian and the shippers is whether these exemptions protect the ship. The interest of the Victory in this question is an indirect one. If those provisions are held to be invalid, there can be no question affecting the Victory to arise; but if they are held to be valid, then it is respectfully submitted that the liability of the Victory should not be thereby increased. If the shippers have chosen to disable themselves by contract from collecting the value of their cargo out of the Plymothian, it would certainly be inequitable to allow this to impose a greater liability upon the owners of the Victory. In other words, we submit that the Victory is entitled to a credit as against the cargo to the full amount of the Plymothian's bond, even though the cargo owners by reason of their contract with the Plymothian have prevented themselves from collecting the balance out of the Plymothian.

Nothing has occurred so far to indicate whether the opposing interests will question this proposition or not, but

whether they do or not, it is submitted that any other result would be highly inequitable and against the current of authority.

The only possible principle upon which such a contention could be based is the old proposition that each is liable for the whole loss, and that there is no contribution among wrong-doers. This latter doctrine that there is no contribution among wrong-doers, originated in cases of wilful torts like trespass; the better opinion is that it never applied to cases that were termed mere *delicts*, that is, mere unintentional injuries to others—it was based upon the theory of conspiracy in which there must have been an evil intent involved.

"As between wrong-doers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other, for the nature of the case is such that he must be presumed to have known that he was doing an unlawful act. Otherwise, where the matter is indifferent in itself, and the wrongful act is not clearly illegal but may have been done in honest ignorance, or in good faith to determine a claim of right, there is no objection to contribution or indemnity being claimed."

Pollock on Torts (London ed., 1887), 170–1.

See especially the note to *Kirkwood* v. *Miller*, 73 Am. Dec. 147–8, and cases cited.

It is submitted that this doctrine of the common law has never been adopted in the admiralty. The admiralty rule originated in the law of average, not the law of torts. The language of the decrees which this court has directed in cases where third parties have recovered against two negligent vessels in collision, shows this. The decree does not go as a general decree against the two, but goes as a separate decree for half against each, with a mere remedy over against the more valuable vessel if the less valuable one is not sufficient to pay her quota.

The Alabama and The Game Cock, 92 U. S., 695.
The Sterling and Equator, 106 U. S., 647.

That the innocent third party has not an absolute unqualified right to proceed against one vessel alone without the right of contribution as between the two vessels, sufficiently appears by the 59th admiralty rule of this court, adopted October term, 1882, 112 U. S., 743.

Hence, even if the decree went against the Victory for any part stipulated away by the cargo owners, the Victory would have the right, as between herself and the Plymothian, to proceed against the Plymothian for reimbursement to the extent of the Plymothian's bond, which would bring about the same result.

This principle is well illustrated by the case of *Chartered Bank vs. Steam Navigation Co.*, L. R. (10 Q. B. D.) 521.

There certain goods were shipped on the *Crown Prince* under a bill of lading containing the negligence exemptions. She came into collision with the *Atjeh*, both ships being owned by the same company. The shippers sued the owners. The court held that if the vessels had been owned by different parties the measure of recovery would have been half against each ship, and that there was no reason why the rule should be differently applied. They therefore gave judgment for one half the loss on the ground of the negligence of the *Atjeh*, and exempted the owners for the half due to the negligence of the *Crown Prince*.

The same principle is applied in the case of the *Viola*, 60 F. R., 296.

In that case the District Judge (Brown) held that the *Harter Act* was not intended to change the relations between the shippers of one ship and the owners of the colliding ship, and that although the owners under the terms of the *Harter Act* could not recover against their own ship, that did not enlarge their measure of recovery against the other,

and he charged the other ship simply with the amount which she would have had to pay if the ship on which the goods were shipped had paid her proportion.

The main principle of this decision, to the effect that the *Harter Act* only regulated the relations between the carrier and his own shippers, and did not affect relations other than the contract of carriage, has since then been adopted by this court in *The Delaware*, 161 U. S., 459.

It is therefore submitted that the limit of the Victory's liability is half, except in so far as she may be required to make up any deficiency in value, and cannot be increased by an artificial deficiency caused by the shippers' own act in releasing their own carrier.

CONCLUSION.

THE CASE SHOULD BE REVERSED, THE VICTORY SHOULD BE HELD BLAMELESS, AND THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO ALLOW THE VICTORY THE COSTS OF ALL THE COURTS HERETOFORE INCURRED, INCLUDING THOSE OF CONTESTING THE QUESTION OF FAULT AND THOSE OF HER LIMITED LIABILITY PROCEEDINGS (Admiralty Rules 54, 55, 56).

Respectfully submitted,

ROBT. M. HUGHES,

Proctor.

No. 66 and 67.

Brief of Hughes for Victory on Costs.

Filed Dec. 27, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CANTON INSURANCE CO., LIMITED, *et al.*, *Appellants*, *vs.* JOHN MACINTYRE, JR., *et al.* } No. 66.

JOHN MACINTYRE, JR., *et al.*, *Appellants*, *vs.* THE CANTON INSURANCE COMPANY, LIMITED, *et al.* } No. 67.

BRIEF FOR THE "VICTORY" ON THE QUESTION OF COSTS.

ROBERT M. HUGHES,
Counsel for the "Victory."

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-27-97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CANTON INSURANCE CO., LIMITED, *et al.*, *Appellants*, *vs.* JOHN MACINTYRE, JR., *et al.* — No. 66.

JOHN MACINTYRE, JR., *et al.*, *Appellants*, *vs.* THE CANTON INSURANCE CO., LIMITED, *et al.* — No. 67.

BRIEF FOR THE "VICTORY" ON THE QUESTION OF COSTS.

STATEMENT.

The counsel for the "Plymothian" moves the Court to send specific directions to the district court as to certain costs the final disposition of which was not provided for by the decree of the district court and is therefore still an open question. The memorandum on behalf of the shippers on the "Plymothian" contends that these costs should be charged against the owners of the "Victory" in addition to their bond. It will be remembered that these were two distinct proceedings.

There was first a proceeding by the owners of the "Vic-

tory," by petition, for limitation of liability. The usual monitions and other steps in limited-liability proceedings were taken, including an appraisal of the "Victory" for $67,500, for which a bond was given.

There was then a proceeding by the owners of the "Plymothian" for limitation of liability. The regular steps were taken on this proceeding also, including an appraisal of the "Plymothian" for about $40,000. The owners of the "Victory," whose damage was only about $13,000, filed a petition in the "Plymothian" proceeding, and the owners of the "Plymothian's" cargo did the same.

The owners of the "Plymothian," whose damage was over $40,000, and the owners of the cargo on the "Plymothian," whose damage was over $70,000, filed petitions in the limited-liability proceeding of the "Victory." The two proceedings were heard together. Each vessel claimed the benefit of the limited-liability proceedings and contested the question of fault.

The final result has been that the "Plymothian" has been held blameless and the "Victory" solely in fault, and the concluding paragraph of the opinion of this Court, while making certain provisions as to costs, does not pass upon the question whether any costs payable by the "Victory" are payable in addition to her bond or are allowable, if paid, as a credit on her bond.

At page 481 of the printed record three different classes of costs are detailed. There is no question of the fact that the costs paid by the "Victory," simply incident to establishing her limitation of liability and amounting to $1,138.48, should be allowed as a credit, and this has been done. However, there are two other classes of costs, namely, the costs incident to the "Plymothian" petition for limitation of liability proper, amounting to $736.42, and the costs incident to trying the question of fault, amounting to $945.38.

Admiralty rule No. 79 of the district court for the eastern district of Virginia provides as follows:

"Appeals shall be taken and matured as prescribed by the rules of the circuit court of appeals for this circuit. All the costs of this court shall first be paid, and the clerk shall not deliver a copy of the record till this is done."

Under this rule, as the "Plymothian" was held blameless in the district court, these two sets of costs were decreed to be paid back to the "Plymothian" equally by the shippers and the "Victory" owners; but the question whether the "Victory" should be allowed this additional credit on her bond or should be required to pay these costs in addition to her bond was left open and requires directions by this Court.

We contend, as to the first of these two classes, that the "Plymothian" cannot recover her costs incident to the limitation of liability, and, as to the second of these classes, that the costs incident to trying the question of fault (which, of course, the "Plymothian" can recover) are payable out of the bond of the "Victory" and not in addition to the bond.

We will discuss these first in reference to the costs incurred by the "Plymothian" in taking the limited-liability proceedings. We contend that the "Plymothian" simply did this as an extra precaution; that it was not a necessary proceeding, and that therefore she has no right either to charge them against the owners of the "Victory" personally or even against the "Victory's" bond.

Here, it must be remembered, that there are two ways of taking the benefit of the limited-liability act. A party whose vessel has been in collision and who is doubtful whether she will be held in fault or not, and wishes to take all chances, is not bound to file any petition for limitation of liability at all. He can set this up as one of the defenses of his answer, and in that case these costs, or by far the major portion of them, would not have been incurred. ("Scotland," 105 U. S., 24.)

In this case the "Plymothian," instead of taking the benefit of the act, could have defended by answer, and the result shows that her proceeding was not a necessary proceeding for her protection, and therefore that the costs of it are not chargeable against the losing side, or even against the bond given for the vessel, thus tending to reduce the amount to be distributed among the maritime claimants.

The "Plymothian" took this proceeding on her own responsibility and must bear the costs of it herself.

The next question of costs arises as to the costs incident to trying the question of fault.

It will be found by reference to the final decree that the district judge did not decide this question at all, but left it open for the appellate court. (R., p. 465.)

The question, simply stated, is this: When a vessel takes the benefit of limited-liability proceedings, and instead of confessing fault contests the question of fault as a part of those proceedings and not in a separate proceeding of libel and answer, and succeeds, at least to the extent that the owners are adjudged entitled to the benefit of the act, are the costs incident to trying the question of fault payable by their owners in addition to their bond, or are they taxable as part of the regular costs of the proceeding, payable out of the bond just like the trustee's commissions and the other costs of the proceeding?

It would seem that the Supreme Court rules on this subject leave little room for discussion. Here, again, we must remember that vessel-owners can get the benefit of a limitation of liability in two ways: First, by setting it up by answer and contesting that as part of their regular defense along with the defenses on the merits; and, second, by resorting to an independent proceeding, as outlined by rules 54–59 of the Supreme Court rules in admiralty. Where a party elects, instead of resorting to a separate proceeding, to set up two defenses in his answer, one of which denies liability of his vessel at all, and the other of which denies the

liability of the owners, even if the vessel is liable, and the court holds that the vessel is liable and the owners are not, in such proceeding, it is, of course, clear that the costs of the entire proceeding are recoverable against the vessel, just as in any ordinary case where a party sets up two defenses and the decision is against him on one of them; but when the vessel-owner, instead of taking this course, elects to proceed by an independent proceeding under the rule, an entirely different principle applies. In that case he comes into court, surrenders the *res*, and asks the court to adjudicate the measure of his responsibility and to whom he is responsible and distribute the proceeds accordingly. The court then is vested with jurisdiction over the trust, and all the expenses of administering the trust come out of the *res* or the bond which represents the *res*. It is exactly similar to a receivership case where the expenses of the receivership are payable before the creditors receive any dividend.

Clear as this is on principle, it is clearer under the language of the rules. Rule 54 provides, in substance, that the owner may file a petition claiming the benefit of limitation of liability and praying proper relief, and requires the court to have the *res* appraised; to require bond for the appraised value of the surrender to the trustee; to issue monition calling on everybody to make proof of claims. Under this proceeding the owners of the other vessel come in and are required, before sharing in the *res*, to prove their claim.

A necessary part of the proof of their claim in a collision case, unless fault is admitted, is proof that the other vessel was in fault, and that is clearly the meaning of rule 55, which provides—

"Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same, and upon the completion of said proofs the commissioner shall make report of the claims so proven, and upon con-

firmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court, as aforesaid, or the proceeds of said ship or vessel and freight (*after payment of costs and expenses*) shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims duly proved and confirmed as aforesaid."

This rule expressly requires the costs and expenses of the proceeding to be paid out of the *res*, and the main proof in a collision case is the proof that the vessel so surrendered was in fault.

But, as if to put this matter beyond question, rule 56 expressly allows the vessel-owner in this proceeding, where rule 55 had previously required the costs to be paid, to contest his or their liability or the liability of their ship or vessel, provided they state the facts and circumstances by reason of which they claim exemption, and gives the other party the right, not only to contest the right of the owner to exemption, but the liability of the vessel itself; hence it is clear that the costs, appellate and original, of this proceeding ought to be paid out of the *res*.

The only case, so far as known to counsel, which passes on this question of costs is that of *In re Harris*, 57 *F. R.*, 253:

The judge does not discuss the question, and merely bases it upon the "Wanata" case, 95 U. S., 600.

The citation does not sustain his position. The "Wanata" was a case where a vessel was libelled, and set up *by answer* a defense on the merits, and also a right to limitation of liability. The court decided against them on the merits and sustained the right to limitation of liability, and it made them pay the costs, not out of their stipulation for value, and not even out of their stipulation for costs in the lower court, but out of an appeal bond which they had given. This, therefore, was a case where a party set up two defenses and the court made the costs follow the general result, just as in any ordinary lawsuit. It was not a proceed-

ing under admiralty rules 55 to 59, where the vessel-owner comes into court and surrenders his vessel or a bond for her value and asks the court to distribute it among the parties entitled thereto, thereby vesting the court with the administration of a trust. And the fact that the Supreme Court did not mean in that case to decide any such proposition is clearly shown by the subsequent case of the "Benefactor," 103 U. S., at p. 249, which was apparently unknown to the judge who announced the decision in the Harris case, and in which the Supreme Court expressly reserved the question, showing that they did not consider it settled.

SUMMARY.

1. *The costs incident to the "Plymothian's" proceeding for limitation of liability should not be charged as costs at all, her proceeding having been taken as an extra and unnecessary precaution, for she might have made the same defense by answer.*

2. *All the costs of the "Victory" incurred in contesting the question of liability, not only in the district court, but in the circuit court of appeals and in this Court, ought to be credited on the bond given by her as of the respective dates when such costs were paid.*

Respectfully submitted.

ROB'T M. HUGHES,
For the "Victory."

THE VICTORY & THE PLYMOTHIAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Nos. 66, 67. Argued October 28, 29, 1897. — Decided November 29, 1897.

On the facts, which are detailed in the Statement of the Case, below, respecting the navigation and the conduct of the Victory and the Plymothian just previous to the collision which caused the injuries and damage herein complained of, *Held;*

(1) That as a general rule, vessels approaching each other in narrow channels, or where their courses diverge as much as one and one half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel;

(2) That the Victory was grossly in fault, and that the collision was the direct consequence of her disregard of that rule of the road, and of her reckless navigation;

(3) That the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment; the burden of proof being upon each vessel to establish fault on the part of the other;

(4) That as the damage was occasioned by collision and was within the exceptions in the bills of lading, it rested upon the underwriters to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her, if sued alone;

(5) That the Plymothian was on her proper course, that she was not bound to anticipate the conduct of the Victory, and that she took all proper precautions as soon as chargeable with notice of risk of collision.

On the twelfth day of November, 1891, the steamers Victory and Plymothian came into collision in the Elizabeth River between Lambert's Point and Craney Island Light. The Plymothian, laden with a cargo of cotton, was outward bound. The Victory was inward bound in ballast. The Plymothian and her cargo were seriously damaged. The Victory was also damaged about the bows.

On the fourteenth of November, the master of the Victory filed a libel against the Plymothian in the District Court for the Eastern District of Virginia; and on November 27 a libel

was filed in that court by the underwriters of the Plymothian's cargo against the Victory and the Plymothian, seeking to hold them both liable for damage thereto. The Port of Plymouth Steamship Company, owner of the Plymothian, filed a petition in said District Court on the third of December, praying for a limitation of its liability for damages growing out of the collision, and giving notice of its intention to contest its liability for any part thereof. A similar petition was filed the same day by MacIntyre and others, owners of the Victory. The value of the owners' interest in the Plymothian and her pending freight was fixed at $45,221, less $5000 salvage, or $40,221; the value of the interest of the owners of the Victory at the sum of $67,500; each gave bond. The damages to the Victory were proven at $14,363.80; to the Plymothian, at $41,684.12; and to the cargo, at $71,427.97.

The cause was heard upon pleadings and evidence, and the District Court held the Victory solely in fault for the collision, and decreed a recovery by the owners of the Plymothian and the underwriters of her cargo, *pro rata*, to the extent of the bond filed by the owners of the Victory in their limitation proceeding. 63 Fed. Rep. 631. The underwriters of the cargo and the owners of the Victory severally appealed from the decree of the District Court to the Circuit Court of Appeals for the Fourth Circuit. That court concurred with the District Court so far as concerned the faults found against the Victory, but held that the Plymothian was also in fault to a slight degree, and modified the decree of the District Court by awarding the whole of the Victory's bond to the cargo, and that any amount remaining unsatisfied should be paid by the owner of the Plymothian. 25 U. S. App. 271.

The owners of the Victory and the owner of the Plymothian thereupon severally petitioned for a writ of certiorari from this court under section six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826; and the writ was accordingly issued.

The facts as stated in substance by the District Court and the Circuit Court of Appeals were as follows:

The Victory was a British steamer of 1774 tons net tonnage, 338 feet in length, 38½ feet in breadth, inward bound in ballast,

drawing seventeen feet aft and thirteen feet forward. Her officers and crew numbered thirty-one all told.

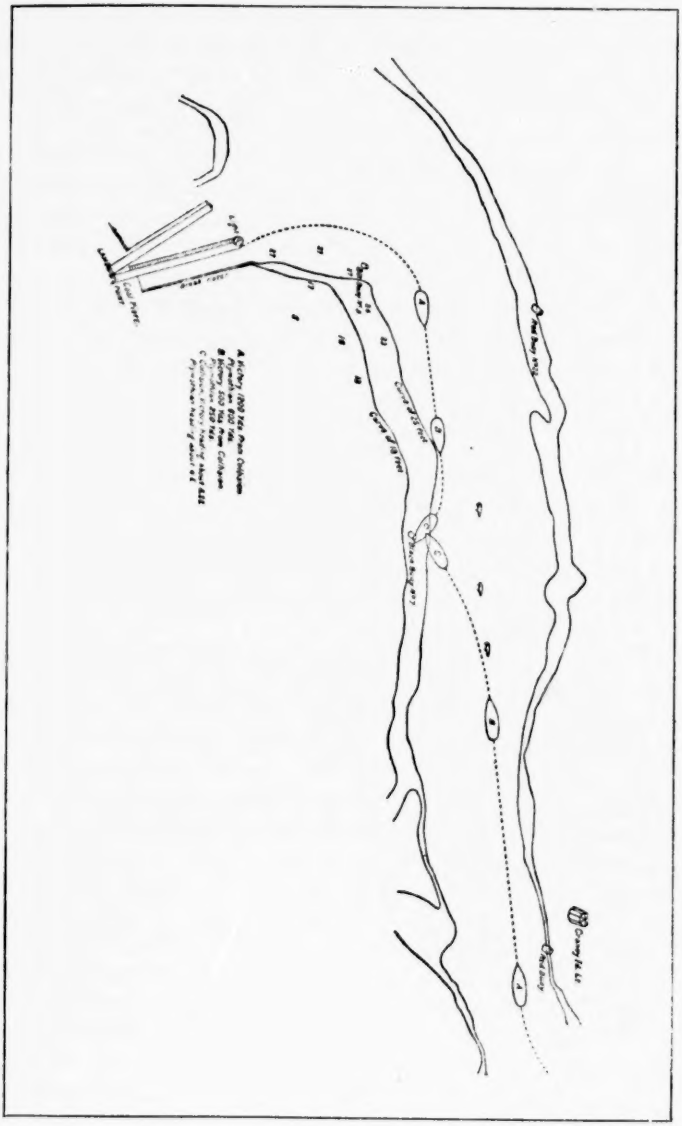
The Plymothian was a British steamer of 1016 tons net register, 260 feet long, laden with a cargo consisting of 3682 compressed bales of cotton. Her officers and crew numbered twenty-one all told. She was outward bound from Galveston to Liverpool, having come in through Hampton Roads to take in coal at Lambert's Point. Her draft was fourteen or sixteen feet. Both vessels were in charge of pilots, and their masters were on their bridges respectively, each acting as lookout, and seeing that the orders of the pilots were executed. Neither ship had a special lookout forward of the bridge on her bows. The collision occurred in a straight stretch of the channel of the Elizabeth River between Craney Island Light House and the turn in the channel at the buoys opposite Lambert's Point. There were two of these buoys, a red one, No. 22, known as the Merrimac Buoy, on the west side, and a black one, No. 9, on the east side. The distance from buoy No. 9 to Craney Island Light House was 1967 yards on the chart, or about a mile and one eighth.

The place of collision was at black buoy No. 7 at the easterly edge of the eighteen-foot curve of the channel, 1200 yards south of the Craney Island Light House and 767 yards north of the black buoy No. 9. The channel is 250 yards wide at Craney Island and 450 yards wide at buoy No. 9.

The diagram of the channel on page 413 sufficiently indicates the situation.

The Plymothian had been taking coal at Lambert's Point pier, a short distance from buoy No. 9. She left the pier at four P.M., heading out off the buoy, the course from the pier to the turning point down the channel being northwesterly at an angle of forty-five degrees. The usual departing signal was given as she moved from the pier. Proceeding outward to round buoy No. 9, with the helm slightly a-port, the engines were at half speed until the buoy was close aboard on the starboard bow. The engines were then put at full speed and the helm hard-a-port, and, rounding the buoy, she set her course down the easterly side of the channel.

Statement of the Case.



At this time, the Victory was seen both by the captain and the pilot of the Plymothian to be coming up the channel, southward, below Craney Island Light, to the westerly side of the mid-channel and on their port bow. The Plymothian thereupon blew a passing signal of one whistle, just as she passed buoy No. 9, and a minute later repeated it without hearing any reply from the Victory. The vessels were over a mile apart at this time with a bend of the channel between them. The wind was southwesterly, with force enough to enable sailing vessels to make two or three knots against the tide. The Victory had in the meantime been maintaining her general course so as to pass well clear, port to port. She had ported her helm, so as to show her port quarter to those on the Plymothian, straightening up to the channel course of S. ½ W. from Craney Island Light. She had been moving at the rate of ten miles an hour, but at Craney Island she slackened her speed and proceeded at the rate of six or seven miles an hour, assisted by a flood tide running southward with a force of two knots. The Plymothian in straightening out at buoy 9 had begun to move against the tide at the rate of about four knots an hour, keeping well to the eastern side of the channel.

As the vessels were thus proceeding, the Victory, shortly after passing Craney Island Light, apparently directed her course towards the easterly side of the channel, as if under a starboard helm. The pilot of the Plymothian blew a single blast on his whistle, and, receiving two in reply, immediately reversed his engines, sending them full speed astern; blew a danger signal of three blasts, and put the helm hard-a-port. The Victory somewhat later also blew a danger signal, and then, or shortly afterwards, reversed her engines three lengths away from buoy No. 7, but not in time to stop her headway, due to high speed and the force of the flood tide. The Victory claimed that she gave two two-blast signals, and there is a conflict of evidence as to her position when the first of them was sounded. The Plymothian heard but one such signal, just preceding the danger blasts.

The Plymothian came practically to a standstill before the

Counsel for Parties.

collision, with buoy No. 7 close under her starboard bow, but the Victory came on and struck the Plymothian's port side at the bridge, at an angle variously estimated at from 45 to 60 degrees, penetrating about fifteen inches into the ship, through her three steel decks, stringer plates and beams. The force of the blow threw the Plymothian's head around to the starboard, so that buoy No. 7, which prior to the collision had been under her starboard bow, was seen to come around in front of her stem to her port bow.

The Plymothian rapidly filled with water, and to prevent her sinking in the channel her engines were put at full speed ahead until she grounded on the mud flats to the eastward of the channel, where she sank in shallow water. She was subsequently raised, repaired temporarily at Newport News, and finally in England, on the completion of the voyage. The Victory was able to proceed to Norfolk. She was also temporarily repaired at Newport News and finally in England.

Of the cargo of 3682 bales of cotton shipped on the Plymothian at Galveston, 1671 bales were shipped under bills of lading, containing the provisions, among others, that the vessel should not be liable for loss or damage occasioned by collisions or other accidents of navigation, even though occasioned by negligence, and that the contract should be governed "by the law of the flag of the vessel carrying the goods."

The other 2011 bales were shipped from interior points under bills of lading given by the inland carrier to the shipper. On reaching Galveston this cotton was delivered to the Plymothian, which issued bills of lading or receipts to the inland carrier, containing the negligence and flag clauses. The bills of lading given by the inland carriers had the negligence, but not the flag clause.

Mr. J. Parker Kirlin and *Mr. Floyd Hughes* for the Plymothian.

Mr. Robert M. Hughes for the Victory.

Mr. Wilhelmus Mynderse for the Canton Insurance Company.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The District Court and the Circuit Court of Appeals concurred in finding the Victory grossly in fault, and we see no reason for arriving at any other conclusion. In our opinion the collision was the direct consequence of the Victory's disregard of the rule of the road and her reckless navigation.

In any aspect of the case, the rule of the road was to keep to the right.

By rule eighteen of the regulations prescribed by the act of April 29, 1864, carried forward in section 4233 of the Revised Statutes, "if two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

The first rule of the supervising inspectors is to the same effect.[1]

---

[1] "RULE I. — When steamers are approaching each other 'head and head' or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course and thereupon shall give as a signal of his intention one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other; but if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left or on the starboard side of each other.

"NOTE. — In the night, steamers will be considered meeting head and head so long as both the colored lights on each are in view of the other.

"Second situation. — Here the green light only will be visible to each, the screens preventing the red light from being seen. They are therefore passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle."

"RULE II. — When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting head and head or nearly so, and the signals by whistles shall be given and answered promptly as in that case specified."

And this was proven to be the usage in the navigation of the Elizabeth River, and known to the master of the Victory.

These vessels were approaching each other in such directions and with such bearings as required them to keep to the right. The distance between Craney Island Light and buoy No. 9 was about a mile and one eighth. When the Plymothian was at buoy No. 9 the Victory was somewhat to the north of or near Craney Island. As the Plymothian straightened down the channel, opposite buoy 9, she was near the eastern side and heading straight down the channel course N. ¼ or ½ E. She was obliged to swing, on leaving the pier, to round the buoy, but had steadied down as she passed it. The evidence thoroughly established that she was never on the westerly side of the channel. We think the District Judge was amply justified in finding as he did that the Plymothian had not, "in coming out from Lambert's pier, gone over to the west of the channel near to red buoy No. 22; and had not, after doing so, recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect."

The Victory when in the neighborhood of Craney Island was either in mid-channel or to the westward of it, and on the Plymothian's port bow. The Victory's witnesses admitted starboarding twice for different schooners and hard-starboarding just before the collision; but both of the lower courts, in accordance with the great weight of evidence, found that the Victory was not prevented by other vessels in the channel, either from going on the westerly side or from stay-

"RULE III. — If when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

ing there, while the testimony of the Victory's pilot indicated that his object in heading over for the easterly side of the channel was to cut off some of the distance into port by passing close to buoys Nos. 7 and 9.

Moreover, as immediately after straightening down the Plymothian ported a little and then hard-ported, even if the Victory had been heading at a gradual angle across the channel all the way from Craney Island, the vessels would have been approaching each other from an oblique direction, which would have brought the inspectors' second rule into play, that vessels so situated "shall pass to the right of each other as if head and head, or nearly so."

The starboard-hand rule had no application. Although when the Plymothian started from the pier her starboard side must necessarily have been down stream as she turned, the vessels were never starboard to starboard after she had rounded buoy 9 and straightened down the channel and the Victory had passed Craney Island and straightened up S. ¼ W. Indeed the rule applicable when two vessels "are crossing so as to involve risk of collision," that "the vessel which has the other on her own starboard side shall keep out of the way," is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. It has often been held as a general rule of navigation that vessels approaching each other in narrow channels, or where their courses diverge as much as one and one half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel. *New York & Baltimore Transportation Co.* v. *Philadelphia & Savannah Steam Navigation Co.*, 22 How. 461; *Union Steamship Co.* v. *New York Steamship Co.*, 24 How. 307; *The Vanderbilt*, 6 Wall. 225; *The Johnson*, 9 Wall. 146; *The John L. Hasbrouck*, 93 U. S. 405; *The Berkshire*, 33 U. S. App. 531, 540.

It is interesting to note that *Union Steamship Co.* v. *New York Steamship Co.* was a case of collision in the channel of the Elizabeth River, where the steamship Jamestown, outward bound, took the eastern side of the channel, rounding

Lambert's Point near the buoy, and proceeded on her course north one fourth east. She was struck by the Pennsylvania, coming up, by reason of the Pennsylvania putting her helm to starboard instead of keeping her proper course, or porting when it became known that the Jamestown was approaching; and it was held that the Pennsylvania was solely to blame.

The principle was embodied in Article 21 of the International Regulations adopted by the act of March 3, 1885, c. 354, 23 Stat. 438, providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel, which lies on the starboard side of such ship," which is Article 25 of the Regulations adopted August 19, 1890, c. 802, 26 Stat. 320, and put in operation, after some postponements and amendments, in 1897, 29 Stat. 885, 893; and of the act of June 7, 1897, 30 Stat. 96, c. 4.

In *The Pekin*, (1897) App. Cas. 532, Articles 21 and 22 of these regulations were considered. Article 21 is given above and Article 22 reads as follows: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

That was an appeal from the decision of the Supreme Court for China and Japan, sitting in Admiralty, in which the steamship Normandie was alone held to blame for a collision which took place between her and the steamship Pekin in the river Whangpoo on April 3, 1896. The case was thus stated by Sir Francis Jeune, delivering judgment in the Privy Council: "At Pootung Point the Whangpoo makes a sharp bend towards the south, returning indeed on its course at something more than a right angle, and to the eastward of that point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside, and the southern the outside channel. The westernmost of these buoys is known as the Old Dock buoy. The Pekin was proceeding up the inside channel, along the line of buoys, that is to say on the starboard side of that channel, and the Normandie was coming down the river to the southward of mid-channel. It

is clear that when near the Old Dock buoy the Pekin ported, and that at or about the same time the Normandie starboarded. The Normandie afterwards endeavored to port, but her helm failed to act owing to what is termed the 'Chow Chow' water, which is, it would appear, a well-known area of eddies or whirlpools off Pootung Point. The result was that a collision occurred well to the north of the river, and somewhat to the eastwards of Pootung Point, the stem of the Normandie striking the port bow of the Pekin.

"The evidence is not clear as to the whistles given by the two vessels. The learned Chief Justice of the Supreme Court has found that 'at the same time two blasts of the Normandie's whistle were blown as a signal to the Pekin, those on board the Pekin simultaneously blew one blast of her whistle.' Those on the Pekin dispute the double blast of the Normandie; but their Lordships think that, accepting as they do the above finding as correct, it may well be that one of the two whistles of the Normandie coincided with the one whistle of the Pekin, and so those on the Pekin heard only one whistle from the Normandie, and believed that only one was given."

The appeal raised the question of the conduct of both vessels. The Normandie was held manifestly in fault. As to the conduct of the Pekin two charges were insisted on by counsel, and after setting them forth, the opinion thus proceeded: "The first of these charges raises the question, were those two vessels crossing vessels within the meaning of art. 22? and also the further question whether the Pekin kept her course? The effect of art. 22 has been made clear by several authorities. The cases of *The Velocity*, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519, and *The Oceano*, 3 P. D. 60, have explained and illustrated the distinction which exists in the effect of this rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to in art. 22 is 'crossing so as to involve risk of collision,' and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as

to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow, the curves of the river bank. But vessels may, no doubt, be crossing vessels within art. 22 in a river. It depends on their presumable courses. If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.

"Their Lordships have restated these propositions because they appear to them decisive of this part of the present case. They are advised by their assessors, and it appears to them clear, that, having regard to the features of the locality at the time the Pekin ported her helm, that is to say when she was near the Old Dock buoy, the vessels were not crossing vessels within the meaning of art. 22. It was reasonable for those on the Pekin, as, without fault on their part, they did not hear the double blast of the Normandie before they took action with their helm, to assume that the Normandie would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision."

We ought to add that, in the case before us, even if the steamers had been so far on the starboard of each other as to justify the pilots in considering that they were not meeting "head and head," or nearly so, there was no pretence of an agreement to go starboard to starboard under Inspectors' Rule I; nor was this a case for the application of Rule III.

Testing the Victory's conduct by settled rules, she was

plainly in fault for not keeping to the right, and in attempting to cross the Plymothian's course, and her speed renders her conduct still more blameworthy. It does not seem to be controverted that at the time of leaving the light-house her speed was five and one half knots through the water, and there was a tide force of two knots, which would make seven and one half knots over the ground. The Circuit Court of Appeals found that from Craney Island up her speed through the water was six or seven miles an hour, with a two-mile tide assisting her, which would make her speed over the bottom eight or nine miles. Certainly she must be held to have known that she was approaching the Plymothian so as to involve the risk of collision, and should have slackened her speed under rule twenty-one, and have stopped and reversed sooner than she did, when she was informed by sight and hearing that her effort to crowd the Plymothian off her rightful course must be unsuccessful.

If she could not port and keep on her own side, she should have reversed at least as early as when her second two-blast signal was blown and not assented to by the Plymothian, yet it was the Plymothian that immediately reversed on hearing that signal and blew three danger signals, while the Victory did not blow her danger signals until after that, and manifestly did not reverse as early as the Plymothian. At the collision the Plymothian's headway had been stopped, but the Victory had such headway on, that she threw the Plymothian's bows around to starboard, while her own bows cut through the Plymothian's three decks and stringer plates a distance of at least fifteen inches, and were damaged as far back as three feet.

None of the excuses the Victory set up for being on the wrong side of the channel tended to palliate her guilt. The only time at which the Plymothian could have been on the Victory's starboard bow was when the Victory was below Craney Island, and she was bound to govern herself by the bearings of the vessels as they were after she straightened up the channel course from the Craney Island south, and then the vessels were port to port. The Victory met a few steam-

ers, but her captain and pilot admitted that they did not force the Victory out of her course, and they were passed near Craney Island, or the light-house, or far below the place of collision. So there were two or three schooners in the channel, but both the courts below found that they did not prevent the Victory from doing her duty by porting and keeping to the right, and her presence near them at all was attributable to her having left the western side of the channel.

We need not elaborate in view of the concurrence of the courts below, and have gone so far into the evidence on this branch of the case because it illustrates the point on which those courts were at variance.

As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409: "Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

"Collision" was an exception in all the bills of lading, and, laying out of view the "negligence" and "flag" clauses, as the damage was occasioned by collision and within the exception, it rested upon the underwriters in this case to defeat the operation of the exception, by proof of such negligence on the part of the Plymothian as would justify a decree against her if sued alone. *Clark* v. *Barnwell*, 12 How. 272, 280; *Transportation Co.* v. *Downer*, 11 Wall. 129; *The City of Hartford and the Unit*, 97 U. S. 323, 325; *The Ludvig Holberg*, 157 U. S. 60.

Apparently it is a hardship for the underwriters on the Plymothian's cargo to be compelled to bear a portion of their own loss, but if the Plymothian was free from fault, this is

merely the result of the Limitation of Liability Acts, the value of the Victory not being sufficient to pay the entire damages sustained.

The Circuit Court of Appeals and the District Court arrived at different conclusions in respect of the Plymothian's entire freedom from fault. The District Court held that the Plymothian was without blame, while the Circuit Court of Appeals was of opinion that she was not wholly blameless, because she kept her course "without taking any precaution whatever until too late, and when the pending collision became inevitable." Whether she may not have been slightly in fault may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in *Williamson* v. *Barrett*, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her.

Were the position and course and signals of the Victory such that the Plymothian was bound to change her course or to stop and reverse sooner than she did?

The Plymothian in passing the buoy straightened down the channel course on the easterly side. The only change she made after straightening down was by porting her helm, which put her closer to the easterly edge of the channel at the time of the collision. She left her pier at four o'clock P.M., under half speed until she rounded the buoy, when the engines were put full speed ahead, 767 yards from the point of collision. The full speed of the Plymothian was seven knots. The tide was running against her with a force of two knots. She had her engines at full speed against the tide perhaps five minutes, and both the courts below found her speed over the ground was about four miles an hour. The Victory blew two double-blast signals and a three-blast signal before the collision.

The evidence of her crew was that the two-blast signals were sounded within a half a minute or a minute of each other, when the steamer was half way between Craney Island and buoy No. 7, and that the three blasts followed a minute or so later. The Plymothian heard only one two-blast signal and the three-blast signal, at that time, as appeared from disinterested evidence on both sides. None of these independent witnesses heard two double-blasts and a three-blast signal from the Victory in short succession. All of them, who saw or heard the first two blasts, testified that that signal was blown when the Victory was to the north of or about Craney Island. And, in her petition for limitation of liability, the Victory claimed to have blown that signal "soon after passing Craney Island Light," and placed the Plymothian at that time as "apparently starting down the river from opposite Lambert's Point." But if she blew two blasts twice, where her captain and pilot said she did, they were blown close together. The Plymothian's evidence showed that she heard but one, and if the Victory blew two blasts twice within such a short interval as she claims, it would seem that one of them overlapped the whistle from the Plymothian, or it may be that the last two blasts were overlapped by the Plymothian's danger signal.

The evidence largely preponderates that only one signal of two blasts and the signal of three blasts could be heard in the neighborhood of the Plymothian at the time the Victory claims she repeated the two-blast signal and followed it up with three; and we think that the conclusion is sustained by the weight of evidence that the Victory's first two-blast signal was blown before she passed Craney Island, when the vessels were so far apart that the Plymothian would not have been bound to stop if she had heard or seen that signal, and as there were at least two river steamboats between the vessels at the time, her pilot might well have supposed that the Victory's two blasts were intended for one of them rather than for him. However, the Plymothian did not see or hear that signal and cannot be held in fault as contributing to the collision because she failed to see or hear what would not have

been followed by any change of course; and if there were two two blast signals within a half a minute, then it is fair to conclude on the evidence that one of them was overlapped by the whistle of the Plymothian. The Plymothian acted immediately and effectively on hearing the two-blast signal she did hear and succeeded in stopping her headway, and this when the risk of collision first appeared, which was when the Victory last starboarded. The course of the Victory was, we have said, along mid-channel or to the west of it, and did not involve a risk of collision until she made a change to port under a starboard helm, just before sounding the two-blast signal heard by the Plymothian. Her witnesses admit that they were starting straight up the channel after passing Craney Island Light, heading S. ½ W. The channel course below Craney Island, as shown by the chart, was S. by E., and in heading S. ½ W. her helm must have been ported, and the vessels were port to port. The testimony of the Plymothian's officers and crew was to the effect that the Victory was on their port bow all the way up from below Craney Island to the point where she changed her course just before blowing a two-blast signal, and they are corroborated by independent and disinterested witnesses. The Victory's witnesses testified to starboarding for two or three schooners, who were near the point of collision, and this would account for her sheer to port, as observed on the Plymothian, when she took her precautions for safety. Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger. *The Servia*, 149 U. S. 144; *The City of New York*, 147 U. S. 72; *Belden* v. *Chase*, 150 U. S. 674.

The rule applicable to them was that each should keep to her own starboard side of the channel. So long as the vessels were port to port, the Plymothian, proceeding at moderate speed, was not bound to stop and reverse on the chance that the other vessel might depart from the rules of navigation.

Nor would the Plymothian necessarily have been bound to stop and reverse at once if she had heard a two-blast signal from the Victory at the time when the Victory claims to have blown it. That was, the Victory says, half way between buoy No. 7 and Craney Island, which would be six hundred yards from the buoy, while the Plymothian was three hundred yards above the buoy, which would make the distance between the vessels nine hundred yards or a half a mile, as the district judge found. The Plymothian was entitled to rely on her repeated single blast to correct the error of the Victory until it was made apparent by a further cross signal or from a change of heading that she was persisting in her wrongful course.

The case of *The Stephanotis and The Horton*, cited to us from the Shipping Gazette and Lloyd's List, of July 26, 1894, was similar in its main features to the one before us. The collision occurred on the river Tyne. On the part of the Stephanotis it appeared that she was bound up on the north side of the channel, at a moderate speed, in a snow storm, when the Horton was observed about two hundred and fifty yards off, also on the north side of the river, in such a position as to make it impracticable for the Stephanotis to pass up between the Horton and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the Horton, which was seen to be approaching as if under a port helm. The Stephanotis came ahead, helm a-starboard, her engines going full speed ahead, as the only means of avoiding a collision. The case for the Horton was that she was keeping to the south of mid-channel, going down the river at the rate of about four knots. The Stephanotis was seen coming up the river half a mile away, bearing right ahead. The Stephanotis thereupon blew one blast, and the Horton responded with one blast, and then ported and steadied her helm. When the vessels were in a position to clear port to port, the Stephanotis blew two short blasts, and the Horton, after replying with one short blast, again slightly ported her helm. The Stephanotis, however, blew two more blasts, and

as she was then seen to be under a starboard helm, the Horton's whistle was blown a short blast, and her engines were set full speed astern, but the Stephanotis struck the Horton, doing her great damage.

The Master of the Rolls, Lord Esher, said:

"The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the Stephanotis to have ported after the Horton blew one blast, and that the master of the Horton might reasonably have expected that he would do so. When the master or pilot of the Horton heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm to port, or to have ceased starboarding, and then they would have gone clear. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the Horton to have stopped or reversed, or stopped even, at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the Horton, but must have been for some other reason, and that the master and pilot of the Horton might reasonably have supposed that when, if anybody had looked, they must have seen the Horton, and must have known that the Horton was porting — they had a right to suppose that the Stephanotis would stop starboarding immediately, and would have ported her helm. If so it was not unreasonable and unseamanlike, I think, for the Horton to keep on as she did. By the time that two ship's lengths were passed over by the two vessels approaching each other — that is, the time of the second blast — the collision was inevitable. It seems to me that the judgment of the President, and the advice of his Trinity Masters, was too severe. It was requir-

ing men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the Stephanotis ought to be held solely to blame."

Similar views were expressed by Judge Brown of the Southern District of New York in *The Florence*, 68 Fed. Rep. 940.

In respect of both these vessels, the captain was acting as lookout on the bridge, but there was no lookout stationed on the bows. Can it be said that the absence of such a lookout on the Plymothian contributed to the injury? Her captain, pilot and third officer were all on the bridge and the view was clear and unobstructed. Would a lookout on the bows have heard or seen more than they did? The bearing of this inquiry is, of course, on the failure of the Plymothian to detect the first alleged two-blast signal blown by the Victory. We have already indicated that the evidence is to our minds satisfactory that that two-blast signal was blown when the Victory was below Craney Island Light House. If so, the vessels were a mile and one eighth apart and the Victory was on the Plymothian's port bow. The Plymothian blew three single-blast signals after that time, and neither of them was dissented from by the Victory until the last one, and the proper manœuvres to avoid the risk then created were promptly taken. But, if it were assumed that the first two-blast signal was blown when the Victory was half way between Craney Island and buoy No. 7, the vessels were still half a mile apart, with room to correct the proposed erroneous course. And if the Victory blew her second two-blast signal inside of a half minute after the first, as her witnesses testified, and the Plymothian upon hearing one of the two immediately acted on it, the failure to hear the other cannot be considered a fault under the circumstances.

We are of opinion that the Plymothian was on her proper course; that she was not bound to anticipate the conduct of the Victory; and that she took all proper precautions as soon as chargeable with notice of risk of collision. The result is that we agree with the District Court in the conclusion that

Statement of the Case.

the Victory was wholly to blame and that the Plymothian was free from fault.

Decree of the Circuit Court of Appeals reversed, the costs of that court to be equally divided between the owners of the Victory and the underwriters; decree of the District Court affirmed; costs in this court for preparing and printing the record to be paid by the owners of the Victory, all other costs in this court to be divided equally between the owners of the Victory and the underwriters.

MUSE *v.* ARLINGTON HOTEL COMPANY.